DOCKET

No. 13-719

Title:	Dart Cherokee Basin Operating Company, LLC, et al., Petitioners v. Brandon W. Owens
Docketed:	December 17, 2013
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(13-603)
Decision Date:	June 20, 2013
Rehearing Denied:	September 17, 2013

Questions Presented

--- Date---	------ Proceedings and Orders----------
Dec 13 2013	Petition for a writ of certiorari filed. (Response due January 16, 2014)
Dec 19 2013	Waiver of right of respondent Brandon W. Owens to respond filed.
Jan 8 2014	DISTRIBUTED for Conference of January 24, 2014.
Jan 8 2014	Response Requested . (Due February 7, 2014)
Jan 27 2014	Order extending time to file response to petition to and including February 21, 2014.
Feb 7 2014	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States of America.
Feb 21 2014	Brief of respondent Brandon W. Owens in opposition filed.
Mar 4 2014	Reply of petitioners Dart Cherokee Basin Operating Company, LLC, et al. filed.
Mar 12 2014	DISTRIBUTED for Conference of March 28, 2014.
Mar 31 2014	DISTRIBUTED for Conference of April 4, 2014.
Apr 7 2014	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States of America GRANTED.
Apr 7 2014	Petition GRANTED.
May 15 2014	Consent to the filing of amicus curiae briefs in support of petitioners received from counsel for petitioners.
May 15 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
May 21 2014	Motion to dispense with printing the joint appendix filed by Dart Cherokee Basin Operating Company, LLC, et al. v. Brandon W. Owens.
May 22 2014	Brief of petitioners Dart Cherokee Basin Operating Company, LLC, et al. filed.
May 29 2014	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
May 29 2014	Brief amici curiae of Washington Legal Foundation, et al. filed.
May 29 2014	Brief amicus curiae of DRI- The Voice of the Defense Bar filed.
Jun 2 2014	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.

Jun 6 2014	The time to file respondent's brief on the merits is extended to and including July 23, 2014.
Jul 9 2014	Record requested from U.S.C.A. 10th Circuit.
Jul 15 2014	Record received from U.S.C.A. 10th Circuit is electronic and available on PACER.
Jul 16 2014	SET FOR ARGUMENT ON Tuesday, October 7, 2014
Jul 23 2014	Brief of respondent Brandon W. Owens filed.
Jul 29 2014	Brief amicus curiae of Public Citizen, Inc. filed.
Aug 7 2014	CIRCULATED.
Aug 22 2014	Reply of petitioners Dart Cherokee Basin Operating Company, LLC, et al. filed. (Distributed)
Oct 7 2014	Argued. For petitioners: Nowell D. Berreth, Atlanta, Ga. For respondent: Rex A. Sharp, Prairie Village, Kan.

PETITION FOR WRIT OF CERTIORARI

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, AND CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A defendant seeking removal of a case to federal court must file a notice of removal containing "a short and plain statement of the grounds for removal" and attach only the state court filings served on such defendant. 28 U.S.C. § 1446(a). Consistent with that statutory pleading requirement, the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits require only that a notice of removal contain allegations of the jurisdictional facts supporting removal; those courts do not require the defendant to attach evidence supporting federal jurisdiction to the notice of removal. District courts in those Circuits may consider evidence supporting removal even if it comes later in response to a motion to remand.

Here, in a clean break from Section 1446(a)'s language and its sister Circuits' decisions, the Tenth Circuit let stand an order remanding a class action to state court based upon the district court's refusal to consider evidence establishing federal jurisdiction under the Class Action Fairness Act (CAFA) because that evidence was not attached to the notice of removal. (That evidence, which was not disputed, came later in response to the motion to remand.)

The question presented is:

> Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or is alleging the required "short and plain statement of the grounds for removal" enough?

CORPORATE DISCLOSURE STATEMENT

Petitioner-Defendant Dart Cherokee Basin Operating Company, LLC is a limited liability company whose sole member is Dart Oil and Gas Corporation, which is a wholly-owned subsidiary of Dart Energy Corporation, both of which are Michigan corporations. None of these entities is publicly traded.

Petitioner-Defendant Cherokee Basin Pipeline, LLC is a limited liability company whose members are Dart Oil and Gas Corporation, a wholly-owned subsidiary of Dart Energy Corporation, and Gas Authority Supplies, LLC. Gas Authority Supplies, LLC's sole member is the Municipal Gas Authority of Georgia, a body corporate and public, a public corporation and an instrumentality of the State of Georgia created pursuant to an Act of the Georgia General Assembly. None of these entities is publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Dart Cherokee Basin Operating Company, LLC and Cherokee Basin Pipeline, LLC petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline Company, LLC v. Brandon W. Owens*, No. 13-603.

OPINIONS BELOW

The Tenth Circuit's order denying rehearing *en banc* is at 730 F.3d 1234; *see also* App. 1. The Tenth Circuit's order denying permission to appeal is at App. 13. The district court's remand order is at 2013 WL 2237740; *see also* App. 15.

JURISDICTION

The Tenth Circuit denied rehearing *en banc* on September 17, 2013, so this Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 242 (1998) (Supreme Court may grant certiorari after Court of Appeals denies permission to appeal); *see, e.g., Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

RELEVANT STATUTORY PROVISIONS

The statute establishing the process for removing a case to federal court (28 U.S.C. § 1446) provides as follows:

> (a) Generally—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice

of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

* * *

(c) Requirements; Removal Based on Diversity of Citizenship.—

* * *

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332 (a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332 (a).

The Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)) provides as follows:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> * * *
>
> (5) Paragraphs (2) through (4) shall not apply to any class action in which—
>
> * * *
>
> (B) the number of members of all proposal plaintiff classes in the aggregate is less than 100.
>
> * * *

The Class Action Fairness Act (28 U.S.C. § 1453) also provides as follows:

> (b) A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446 (c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

STATEMENT OF THE CASE

This petition presents an issue affecting the rights of every defendant seeking access to the federal courts. Contrary to the opinions from at least *seven* other Circuits, the Tenth Circuit imposes a requirement that a defendant initiating removal must not only

come forward with *allegations* of the requisite jurisdictional facts, but also present *evidence* of such facts in the notice of removal. Here, this judicially-created requirement has resulted in denying a class action defendant access to the federal court even though it is undisputed that the case satisfies each of the substantive requirements for federal court jurisdiction established by Congress under the Class Action Fairness Action of 2005 ("CAFA").

Almost a quarter-century ago, Congress eliminated the requirement that a removing defendant initiate removal by filing a verified petition, thereby eliminating any evidentiary requirement. *See* H.R. Rep. No. 100-889, at 71-72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032 ("The proposed amendment [to 28 U.S.C. § 1446(a)] requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a)."). Instead, Congress required a defendant to initiate removal by filing "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal," thereby mirroring the requirements placed on plaintiffs filing complaints in federal court under Rule 8. *See* 28 U.S.C. § 1446(a).

More recently, to address perceived abuses in state court class action litigation, Congress enacted the Class Action Fairness Act, which "enable[s] defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2382 (2011). CAFA "is intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if

properly removed by any defendant." S. Rep. 108-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 2005 WL 627977.

Here, Respondent Brandon Owens filed a class action against Petitioners Dart Cherokee and Cherokee Basin in the district court in Wilson County, Kansas, seeking royalty payments under certain Kansas oil and gas leases. Owens did not specify a damages amount in his complaint. App. 15-16.

Under CAFA, a class action is removable to federal court if there is minimal diversity, at least 100 putative class members, and at least $5 million in controversy. *See* 28 U.S.C. § 1332(d); *see also Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348, 1350 (2013) (Congress enacted CAFA to ensure "Federal court consideration of interstate cases of national importance") (internal quotation marks omitted). Owens's complaint satisfies all of CAFA's jurisdictional requirements, so Petitioners removed the case to federal court.

Petitioners filed a Notice of Removal containing the required "short and plain statement of the grounds for removal" (28 U.S.C. § 1446(a)): They alleged in the Notice that the putative class includes approximately 400 people; that the putative class members own royalty rights in approximately 700 oil and gas wells; that the class action involves a dispute about those wells' production from January 1, 2002 until now; that Owens seeks three types of royalty damages; and that, based on the nature of the claims asserted, the size of the putative class, and length of the proposed class period, Petitioners' calculation of the amount in controversy exceeds $8.2 million. App. 2, 4-5.

Owens moved to remand the case to state court. He did not dispute the jurisdictional facts alleged in the Notice of Removal but argued that the Notice was "deficient as a matter of law" because it contained no admissible *evidence* supporting Petitioners' jurisdictional allegations. App. 21.

In response to the remand motion, Petitioners offered a declaration from one of Dart's corporate officers. That declaration contained evidence supporting the jurisdictional facts alleged in the Notice of Removal—including updated damages calculations "based on limited informal discovery" and some evidence supporting federal jurisdiction that Petitioners discovered *after* removal (including Owens's own statement in a mediation brief that the amount in controversy was over $20 million including interest). App. 20-21.

Owens again did not dispute Petitioners' evidence but instead argued in his reply brief that the Notice of Removal could "not be cured" by attaching evidence in response to a motion to remand. App. 21.

The district court granted Owens's motion and remanded the case to state court. Believing that Petitioners were required to *prove* in their Notice of Removal that CAFA's jurisdictional requirements were met, the court concluded that "the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million." App. 26. As important, the court refused to consider the evidence in Henderson's declaration—evidence that conclusively established federal jurisdiction under CAFA—simply because Petitioners had not

attached that evidence to their Notice of Removal. *Id.*[1] The district court felt constrained to ignore the declaration because, in its view, the "Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." *Id.*

Petitioners sought review from the Tenth Circuit pursuant to 28 U.S.C. § 1453(c), but a divided Tenth Circuit panel denied their petition. App. 13. Petitioners then sought rehearing *en banc*, but the Tenth Circuit denied that petition in a split 4-to-4 vote. App. 1.

Judge Hartz (joined by Judges Kelly, Tymkovich, and Phillips) dissented from the denial of rehearing *en banc*. Judge Hartz began the dissent with this:

> This court owes a duty to the bench and bar to provide guidance regarding the procedural requirements of the Class Action Fairness Act of 2005 (CAFA). Yet it has let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.

App. 2; *see also id.* at 3 ("It imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court").

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[1] The district court acknowledged only one possible exception to this rule—when a defendant "ha[s] no information from which to establish the amount of damages" and "request[s] leave to conduct discovery on the amount in controversy." App. 26-27.

Emphasizing that Section 1446(a) "parrots Rule 8," Judge Hartz stated that "there should be no dispute that Petitioners' notice of removal was adequate." App. 4. He pointed to this Court's recent decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), where the Court *assumed* that it was enough for a party seeking removal to federal court simply to *allege* the jurisdictional facts in their notice of removal. *Id.* at 96-97 ("When challenged on *allegations of jurisdictional facts*, the parties must support their allegations by competent proof.") (emphasis added).

Judge Hartz concluded with this:

> In short, I think it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation.

App. 11.

REASONS FOR GRANTING THE WRIT

A well-developed circuit split pits the Tenth Circuit alone against *seven* other Circuits. Those other Circuits have concluded that the notice of removal must satisfy only a notice-pleading standard or that district courts are allowed or required to consider post-notice of removal evidence when determining whether removal was proper. There is no statutory basis for the Tenth Circuit's double standard for plaintiffs and defendants seeking access to the federal courts by requiring defendants to satisfy both a notice pleading standard *and* an evidentiary burden in their initial federal court filing. The plain language of 28 U.S.C.

§ 1446(a) adopts the notice-pleading language from Rule 8 of the Federal Rules of Civil Procedure. Moreover, the Tenth Circuit approach thwarts the very purpose of CAFA by denying federal jurisdiction to cases such as this that are precisely the type of cases Congress intended to allow into the federal courts.

Petitioners' unrefuted evidence submitted in response to the motion to remand established that this case satisfies each of the CAFA jurisdictional requirements; the Notice of Removal contained sufficient allegations, but no admissible evidence. The appellate record in this case gives this Court the opportunity to provide the needed guidance to the bench and bar as to "when" a defendant seeking removal must satisfy its evidentiary burden.[2]

This case presents an important question of federal removal procedure and federal jurisdiction that affects all litigants and district courts involved in a removal proceeding. More than 30,000 cases are removed to federal court each year. *See* Judicial Business 2012, uscourts.gov/statistics/judicialbusiness/2012/statistical-tables-us-district-courts-civil.aspx (Table C-8, 2008-12). This Court should weigh in, clarify the pleading requirement, and resolve this split in the Circuits.

I. THE TENTH CIRCUIT STANDS ALONE IN REQUIRING A DEFENDANT TO ATTACH EVIDENCE TO THE NOTICE OF REMOVAL.

All seven other Circuits that have considered the modern requirements of a notice of removal directly conflict with the Tenth Circuit, and two Circuits have

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[2] Petitioners submit that this case also is a candidate for summary disposition. *See* S. Ct. R. 16.

expressly considered and rejected the Tenth Circuit line of precedent. *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 948-49 (11th Cir. 2000); *Harmon v. OKI Sys.*, 115 F.3d 477, 479-80 (7th Cir.), *cert. denied*, 522 U.S. 966 (1997). While the Tenth Circuit now applies its precedent to *deny* federal jurisdiction under CAFA to class action defendants who satisfy their evidentiary burden in response to a motion to remand, other Circuits *grant* such defendants access to the federal courts. *See, e.g., Janis v. Health Net, Inc.*, 472 F.Appx. 533, 534-35 (9th Cir. 2012); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 772-774 (11th Cir. 2010).

At least five Circuits have concluded that Section 1446(a) does *not* require the submission of any evidence with the notice of removal, but rather establishes a pleading requirement—one that is indistinguishable from notice pleading under Rule 8. *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008) (explaining that Section 1446(a)'s language is "deliberately parallel to the requirements for notice pleading found in Rule 8(a)" and holding that the district court erred in "requir[ing] a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint"); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (explaining that Section 1446(a) establishes a "pleading requirement, not a demand for proof"); *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012) (same); *Janis*, 472 F.Appx. at 534-35 (9th Cir.) (holding that "[n]othing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal. Section 1446(a) requires merely a 'short and plain statement of the grounds for removal.'"); *Lowery v. Al. Power Co.*, 483

F.3d 1184, 1217 n.73 (11th Cir. 2007) ("Section 1446(a)'s requirement of a 'short and plain statement of the grounds for removal' is consonant with the pleading requirements of Rule 8(a).").[3]

Moreover, contrary to the Tenth Circuit, six other Circuits allow or require district courts to consider evidence submitted in response to a motion to remand to determine whether removal was proper. *See Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 46, 51-53 (1st Cir. 2009) (holding that "the entire record must be evaluated" to determine whether the jurisdictional minimum amount in controversy under CAFA was satisfied); *Bartnikowski v. NVR, Inc.*,307 F.Appx. 730, 732-33, 735-37, 739 (4th Cir. 2009) (considering the declaration defendant proffered in response to a motion to remand in deciding whether defendant had established the $5 million jurisdictional minimum amount in controversy under CAFA by a preponderance of the evidence); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (concluding "post-removal affidavits may be considered in determining the amount in controversy at the time of removal" when "the basis for jurisdiction is ambiguous"); *Harmon*, 115 F.3d at 479-80 (7th Cir.) (asking "should a court really be barred from considering reliable evidence merely because the evidence was not in the record on the date of removal? [And holding:] The test should simply be whether the evidence sheds light on the situation which existed when the case was removed."); *Janis*, 472 F.Appx. at 534-35 (9th Cir.) (granting federal jurisdiction under CAFA, in part, because the fact that "the evidence was

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[3] *See also Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965) (finding that "the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings").

from [the defendant]," and therefore available, but not submitted, at the time of removal, was *not* a "valid reason for ignoring [the] evidence"); *Pretka*, 608 F.3d at 772-774 (11th Cir.) (granting federal jurisdiction under CAFA, in part, because "the jurisdictional evidence that [the defendant] attached to its opposition to remand should not have been excluded merely because it was submitted in response to the plaintiff's motion to remand").[4]

Petitioners' removal petition would have turned out differently in the First, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits. Petitioners' Notice of Removal included detailed allegations of the jurisdictional facts supporting removal under CAFA. Those allegations satisfied Rule 8's pleading requirements. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And if that were not enough, the unchallenged declaration Petitioners offered in response to the motion to remand conclusively established the requirements for jurisdiction under CAFA. *See also* App. 2-3.

But in the Tenth Circuit, this class action now sits in state court for the simple fact that Petitioners did not attach evidence of the amount in controversy to the Notice of Removal. The upshot is that a defendant in the Tenth Circuit faces a much heavier initial burden than a similarly situated defendant in almost any

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[4] *See also Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 374, 376-77 (9th Cir. 1997); *Sierminski*, 216 F.3d at 947, 948-49 (11th Cir.) (holding that "there is no good reason to keep a district court from eliciting or reviewing evidence outside of the removal petition").

other Circuit. This Court should resolve this long-standing, well-developed, one-sided circuit split.[5]

II. THE TENTH CIRCUIT PRECEDENT IS CONTRARY TO THE PLAIN LANGUAGE OF THE REMOVAL STATUTES, THE CLASS ACTION FAIRNESS ACT, AND THIS COURT'S PRECEDENT.

"Nothing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal." *Janis*, 472 F.Appx. at 534. Congress eliminated any evidentiary requirement in 1988. Specifically, Congress repealed the requirement that defendants file a verified petition for removal and, instead, required only that a defendant file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal" thereby mirroring the requirements placed on plaintiffs filing complaints in federal court under Rule 8 of the Federal Rules of Civil Procedure. *See* H.R. Rep. No. 100-889, at 71-72 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982-6032 ("The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a).").

The plain language of Section 1446(a) establishes a notice-pleading standard for defendants' notices of

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[5] Because this case involves federal jurisdiction and will establish federal removal procedure, and because of the extremely one-sided nature of this circuit split, *certiorari* is appropriate under the Court's supervisory power. *See* Rule 10(a); *see also* Eugene Gressman, *et al.*, SUPREME COURT PRACTICE, at 273-74, 257 (9th ed. 2007).

removal. *See Hartis*, 694 F.3d at 944-45 (8th Cir.); *Spivey*, 528 F.3d at 986 (7th Cir.); *Ellenburg*, 519 F.3d at 194, 199-200 (4th Cir.). Instead of requiring the submission of evidence with the notice of removal, the statute requires defendants to submit only "a copy of all process, pleadings, and orders served upon such defendant" in the state court proceeding. 28 U.S.C. § 1446(a). Thus, the Tenth Circuit's double standard for access to the federal courts, which requires defendants to meet a standard "even more onerous than the code pleading requirements that federal courts abandoned long ago," is directly contrary to the Congressional intent behind and the plain language of Section 1446(a). App. 2.

In 2011, Congress passed the Federal Courts Jurisdiction and Venue Clarification Act ("JVCA"), which amended 28 U.S.C. § 1446(c)(2) addressing removal in situations in which a plaintiff's complaint fails to specify an amount in controversy. In terms of a notice of removal, Subsection A requires only that the notice "may assert the amount in controversy," *not* that it must prove or provide evidence of the amount in controversy. The House Judiciary Committee report explains that "*defendants may simply allege or assert that the jurisdictional threshold has been met.* Discovery may be taken with regard to that question. *In case of a dispute*, the district court must make findings of jurisdictional fact to which *the preponderance standard applies.*" H.R. Rep. No. 112-10, at 16 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580 (emphasis added).

Subsection (B) of Section 1446(c)(2) then sets forth the preponderance of evidence standard to be applied by the district courts *after* a plaintiff has challenged a defendant's jurisdictional allegation to determine the

ultimate question of whether "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A)." Thus, contrary to the Tenth Circuit precedent, this provision requires *neither* (a) that a removing defendant submit any evidence in its notice of removal, *nor* (b) that district courts must disregard post-notice of removal evidence proffered by defendants in response to a motion to remand.

The Tenth Circuit's requirement that defendants proffer their proof with their notice of removal, *before* their jurisdictional allegations could be challenged, also runs afoul of this Court's long-standing precedent. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). In *McNutt*, this Court held that, *if* "*allegations of jurisdictional facts are challenged* by his adversary in any appropriate manner, [the party seeking access to the federal courts] must support them by competent proof [and] justify his allegations by a preponderance of evidence." *Id.* at 189 (emphasis added). This Court recently applied its holding in *McNutt* to removals under CAFA, and unanimously held that: "The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. *When challenged on allegations of jurisdictional facts*, the parties must support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (citing *McNutt*; emphasis added). *See* App. 6-7.

Congress passed the "Class Action *Fairness* Act" (emphasis added) to address several abuses occurring in state court that had "harmed class members with legitimate claims and defendants that ha[d] acted reasonably." Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 4 (2005). CAFA was "intended to expand substantially

Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by any defendant." S. Rep. 108-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 2005 WL 627977; *see also Smith v. Bayer Corp.* 131 S.Ct. 2368, 2382 (2011) (Congress enacted CAFA to "enable[] defendants to remove to federal court any sizable class action involving minimal diversity.").[6]

Under CAFA, class action litigants are entitled to have their cases decided in federal court when (1) "any member of a class of plaintiffs is a citizen of a State different from any defendant," (2) "the number of members of all proposed plaintiff classes in the aggregate is [at least] 100," and (3) "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2) and (5); *see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013); *see also* 151 Cong. Rec. H723, H727 (daily ed. Feb. 17, 2005) (statement of Rep, Jim Sensenbrenner) ("And if a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case.").

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[6] *See also Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."); *Amoche*, 556 F.3d at 47-48 (in addition to "extending federal subject matter jurisdiction to include most major interstate class actions, CAFA also made a federal forum more accessible to removing defendants by imposing only a minimal diversity requirement, eliminating the statutory one-year time limit to removal, and providing for interlocutory appeal of a federal district court's remand order").

Earlier this year, this Court recognized the broadening of federal court jurisdiction for class actions as the "primary objective" of CAFA, and this Court unanimously rejected the "form over substance" application of the removal requirements that would result in remand of a case that otherwise could satisfy the $5 million amount in controversy jurisdictional requirement. *Standard Fire*, 133 S. Ct. at 1350 (named plaintiff's stipulation in the complaint to only seek damages below $5 million was not binding on the putative class and could not defeat removal).[7]

Here, there is no dispute that this case satisfies each of the substantive jurisdictional requirements under CAFA, including the $5 million amount in controversy threshold, and, therefore, is precisely the type of case Congress intended to qualify for federal jurisdiction. Plaintiff does *not* deny that any of these requirements are, in fact, satisfied by this case. Instead, Plaintiff sought remand solely on the basis of a purported procedural defect claim that Defendants submitted their evidence in response to the motion to remand

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[7] This rejection of a form over substance approach to removal jurisdiction has long-since been a part of the Supreme Court removal jurisprudence and has manifested itself in several ways, including expressly considering affidavits submitted after a notice of removal. *See Willingham v. Morgan*, 395 U.S. 402, 408 n.3 (1969) ("for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits" submitted in support of a summary judgment motion). Certain Courts of Appeals have followed the Supreme Court's lead to consider later filed evidence as an amendment to the notice of removal, thereby avoiding directly addressing the issue now raised, but nonetheless resulting in decisions directly contrary to the Tenth Circuit's preclusion of such evidence. *See, e.g., USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 205 (3rd Cir. 2003).

rather than attaching it to their notice of removal—*i.e.*, a form over substance argument of the same ilk previously rejected by this Court.

As this Court explained long ago in upholding the fraudulent joinder doctrine, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). The Tenth Circuit's imposition of a judicially-created barrier that has the practical effect of keeping cases out of federal court that are precisely the types of cases Congress intended to have access to the federal courts is contrary to the removal statutes, the enactment of the Class Action Fairness Act, and this Court's own precedent.

CONCLUSION

This Court should grant the petition for writ of *certiorari,* resolve the circuit split, and provide the district courts and removal litigants the clear guidance they need on the proper standard.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 9/17/13]

No. 13-603
(D. Ct. No. 5:12-CV-04157-JAR-JPO)

DART CHEROKEE BASIN OPERATING COMPANY, LLC;
CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

Respondent.

Filed September 17, 2013

ORDER

Before KELLY, LUCERO, HARTZ, TYMKOVICH, HOLMES, MATHESON, BACHARACH and PHILLIPS, Circuit Judges.*

This matter is before the court on the petitioners' *Petition for Rehearing En Banc*. We also have a response. Both pleadings were circulated to all the judges of the court who are in regular active service and who are not recused in this proceeding.

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* The Honorable Mary Beck Briscoe and the Honorable Neil M. Gorsuch are recused in this matter and did not participate in the court's en banc review.

Upon consideration, a poll was requested and the votes were evenly divided. Consequently, the poll did not carry and the en banc petition is denied. *See* Fed. R. App. P. 35(a)(noting a majority may direct en banc review).

Judges Kelly, Hartz, Tymkovich and Phillips would grant the petition, with Judge Hartz writing the attached formal dissent, in which Judges Kelly, Tymkovich and Phillips join.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER
Clerk of Court

* * * *

HARTZ, Circuit Judge, joined by KELLY, TYMKOVICH, PHILLIPS, Circuit Judges, dissenting:

This court owes a duty to the bench and bar to provide guidance regarding the procedural requirements of the Class Action Fairness Act of 2005 (CAFA). Yet it has let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.

Petitioners removed this case to federal court under CAFA. The notice of removal alleged the amount in controversy to be over $8 million, comfortably above the jurisdictional requirement of $5 million, and explained how Petitioners arrived at that figure. After Owens moved to remand the case to state court, Petitioners submitted undisputed proof that the

amount in controversy exceeded $14 million. Nevertheless, the district court granted Owens's motion. It did so only because the notice of removal itself had failed to provide evidentiary support, "such as an economic analysis or settlement estimates" for the $8 million figure. Mem. & Order at 10, *Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR (D. Kan. May 21, 2013).

Petitioners requested permission to appeal to this court under 28 U.S.C. § 1453(c), but a divided panel denied permission. Petitioners then sought en banc review of the panel's decision. I respectfully dissent from this court's denial of that request by an equally divided vote.

The district court's decision, although not an unreasonable interpretation of language in some of this court's opinions, is contrary to fundamental principles regarding the purpose and function of pleadings in federal court and to Congress's apparent understanding when it recently codified the procedure by which a removing party can establish the amount in controversy. It imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court (Owens does not cite to any such case). Unfortunately, this may be the only opportunity for this court to correct the law in our circuit. After today's decision any diligent attorney (and one can assume that an attorney representing a defendant in a case involving at least $5 million—the threshold for removal under CAFA—would have substantial incentive to be diligent) would submit to the evidentiary burden rather than take a chance on remand to state court; if so, the issue will not arise again.

Under the procedural system that has been in effect for almost 80 years, all a party must do in initiating a case in federal court is to submit a pleading that "contain[s] a short and plain statement of the grounds for the court's jurisdiction," Fed. R. Civ. P. 8(a)(1), and "a short and plain statement of the claim showing that the pleader is entitled to relief," *id.* at 8(a)(2). The party need not produce proof of an allegation in the pleading until the allegation is challenged by the opposing party or, perhaps, the court. Then the party must establish the alleged fact under the applicable burden of persuasion, ordinarily the preponderance of the evidence.

Until now, there has been no reason to believe that a different rule governs the jurisdictional allegations in a notice of removal. The applicable statute parrots Rule 8, requiring only that the notice "contain[] a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Although the removing party must establish controverted jurisdictional allegations by a preponderance of the evidence, nothing in the removal statutes or Supreme Court decisions, or any holdings of this court, require submission of such evidence before the jurisdictional allegations are challenged.

Under this standard there should be no dispute that Petitioner's notice of removal was adequate, even if we apply *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), in this context to require that the notice raise a plausible claim that the amount in dispute is at least $5 million. The pertinent paragraphs state:

> 9. [Owens's] Petition does not state a specific amount as damages. It does, however, pray for payment of royalties and interest claimed to be due to royalty owners who were paid royalties with regard to gas produced from wells located in

> Kansas in which DCBO [one of the Petitioners] has owned any working interest, for the period from January 1, 2002 to the present.
>
> 10. This matter involves approximately 700 wells that [DCBO] currently operates in Kansas. The purported class consists of royalty owners that own an interest in the wells in which [DCBO] has a working interest in Kansas. There are approximately 400 royalty owners with interests in the 700 wells at issue.
>
> 12. [Owens] claims that [DCBO] owes additional royalties because, among other things, [DCBO] (a) pays royalties based upon a below market price; (b) improperly deducts charges from the sales price for costs associated with gathering, compression, dehydration, and/or treatment for computing royalties; and (c) improperly shifts a portion of the conservation fee to royalty owners.
>
> 13. [Owens] seeks to recover on behalf of a class of any royalty owner in any well located in Kansas in which [DCBO] has owned any working interest from January 1, 2002 to the present.
>
> 14. [DCBO] has undertaken to quantify the amount of additional royalties that would be owed if all or substantially all of the adjustments to royalties advanced by [Owens] were found to be required to be made.
>
> 15. Based upon this calculation of [Owens's] putative class claims, the amount of additional royalties sought is in excess of $8.2 million.

Notice of Removal at 3-4, *Owens*, No. 12-4157-JAR-JPO (D. Kan. Dec. 5, 2012). Allegations of the amount in controversy are ordinarily much more abbreviated.

The Supreme Court has not imposed special burdens at the pleading stage with respect to jurisdictional issues. The sequence of pleading and proving jurisdiction is described in the discussion of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992):

> The party invoking federal jurisdiction bears the burden of establishing [the] elements [of standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume the general allegations embrace those specific facts that are necessary to support the claim.* In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations but must set forth by affidavit or other evidence specific facts

(emphasis added) (citations, brackets, and internal quotation marks omitted).

Nor has the Court imposed special rules regarding the pleading of jurisdiction in the removal context. In a recent decision regarding CAFA jurisdiction, the Supreme Court unanimously stated: "The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it. When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent

proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010) (emphasis added) (citations omitted).

Here, Owens challenged the notice of removal and Petitioners responded with a declaration by an officer setting forth a calculation showing a potential liability far exceeding $5 million. See *Owens v. Dart Cherokee Basin Operating Co.*, 2013 WL 2237740, at *2 (D. Kan. May 21, 2013). The district court did not find the declaration lacking. It simply held that it came too late. First, it ruled that the notice of removal was inadequate. It explained:

> Although [Petitioners] state[d] in the Notice of Removal that they have "undertaken to quantify the amount of additional royalties that would be owed," [Petitioners] fail[ed] to incorporate any evidence supporting this calculation in the Notice of Removal, such as an economic analysis of the amount in controversy or settlement estimates. Accordingly, in the absence of such evidence, the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million.

Id. at *4. It then stated, "Even assuming that [Petitioners] can now establish the amount in controversy exceeds $5 million, they were obligated to allege all necessary jurisdictional facts in the notice of removal." *Id.* at *5.

The burden imposed by the district court on Petitioners was excessive and unprecedented. The notice of removal adequately alleged jurisdiction, Petitioners' evidence of jurisdiction was more than adequate, and there was no basis for requiring Petitioners to submit that evidence before the

adequacy of the notice was challenged. In its response to Petitioners' petition for permission to appeal, Owens characterizes the issue before this court as follows:

> [Have Petitioners] met the criteria for interlocutory review of the district court's order granting remand where [Petitioners'] notice of removal offered no evidence to support its allegation that the amount in controversy was satisfied, even though [Petitioners] had evidence of the amount in controversy at the time of removal but did not offer that evidence until almost six months later?

Resp. to Pet. for Reh'g En Banc at 3-4, *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-603 (10th Cir. July 22, 2013). (I should note that the reason for Petitioners' delay in offering evidence is that all proceedings were stayed pending mediation. *See Owens*, 2013 WL 2237740, at *1.) I think the clear answer to the question is yes. Owens obviously reads the district court's decision as requiring the submission of evidence with a notice of removal. We have a duty to inform the bench and bar that the law imposes no such requirement.

The district court relied on our holding in *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008), that a defendant who removes a case to federal court under diversity jurisdiction must establish the amount in controversy (if the plaintiff did not allege a sufficiently high amount) by a "preponderance of the evidence," *id.* at 954 (internal quotation marks omitted). But the preponderance-of-the-evidence standard is the typical standard by which an allegation in a pleading must be proved for the pleading party to prevail. Applying that standard of proof does not change the typical

requirements for pleading, and *McPhail* did not change them. This court's opinion did not address the questions presented here—(1) how much needs to be alleged in the notice of removal; and (2) after the notice is challenged, in what circumstances, if any, can the removing party rely on supporting evidence not submitted with the notice of removal? The proposition that evidence is not required at the pleading stage is clear from the opinion of the Seventh Circuit in *Meridian Security Insurance Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006), on which *McPhail* heavily relied. Noting that the preponderance-of-the-evidence standard ultimately derives from the Supreme Court's opinion in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936), the circuit court quoted the following sentence from that opinion, "*If [the] allegations* [by the party asserting jurisdiction] of jurisdictional facts *are challenged* by his adversary in any appropriate manner, *he must support them by competent proof*," *id.* at 189 (emphasis added). *See Sadowski*, 441 F.3d at 539–40.

Moreover, my view of the procedural requirements for establishing the amount in controversy for purposes of removal is apparently shared by the drafters of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the JVCA), which amended 28 U.S.C. §1446(c)(2). That paragraph now reads:

> If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—
>
> (A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

28 U.S.C. § 1446(c)(2) (emphasis added).

As is apparent from the statutory language, Congress adopted the same preponderance-of-the-evidence standard endorsed in our *McPhail* opinion and the Seventh Circuit's *Sadowski* opinion. Indeed, the report of the House Judiciary Committee, where the JVCA originated, stated that the proposed statutory language "adopting the preponderance standard . would follow the lead of recent cases," and cited two opinions: *McPhail* and *Sadowski*. H.R. Rep. No. 112–10, at *16 (2011), reprinted in 2011 U.S.C.C.A.N. 576, 580. Yet the procedure described by the report is not the procedure adopted by the district court in this case. Immediately after citing the two opinions, the report states as follows:

> As those cases recognize, defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, *defendants may simply allege or assert that the jurisdictional threshold has been met*. Discovery may be taken with regard to that question. In case of a dispute, the district court must make findings

> of jurisdictional fact to which the preponderance standard applies.

Id. (emphasis added).

Interestingly, the JVCA, perhaps through inadvertence, explicitly applies to standard diversity removals but apparently does not apply to removals under CAFA. Section 1446(c)(2) states that it applies when "removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a)." Removal under CAFA, however, is governed by § 1332(d). Nevertheless, as we stated in *Frederick v. Hartford Underwriters Insurance Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012), "[T]here is no logical reason why we should demand more from a CAFA defendant than other parties invoking federal jurisdiction." (internal quotation marks omitted).

In short, I think it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation.

Finally, I would add a few words about our discretionary jurisdiction to review removals under CAFA. CAFA is a newcomer to the scene and its intricacies are unfamiliar to many of us. It will always be tempting for very busy judges to deny review of a knotty matter that requires a decision in short order. But we have an obligation to provide clarity in this important area of the law. A year before deciding to grant an appeal on the issue resolved in *Frederick* (whether CAFA removal can be avoided by a plaintiff seeking class certification if the plaintiff stipulates that the class would not seek damages at or above $5

million), we had refused to grant an appeal to review a district court's decision that was contrary to what we later decided in *Frederick*. Yet the same issue was deemed sufficiently worthy of attention by the Supreme Court that it granted certiorari on the issue and reviewed a circuit decision not to grant permission to appeal. *See Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013). And that issue, unlike the one here, was one that would continue to arise because defendants seeking to remove under CAFA could do nothing to avoid the problem. I hope we will be more willing in the future to grant requests for appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed 6/20/13]

No. 13-603

DART CHEROKEE BASIN OPERATING, CO., LLC;
CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

Respondent.

Filed June 20, 2013

ORDER

Before LUCERO, O'BRIEN, and HOLMES, Circuit Judges.

This matter is before the court on the Petition for Permission to Appeal from the United States District Court for the District of Kansas 5:12-CV-04157-JAR-JPO – The Honorable Judge A. Robinson (the "Petition"). The Petition was filed by Defendants Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline, LLC. Plaintiff Brandon W. Owens filed a response opposing the Petition.

Upon careful consideration of the parties' submissions, as well as the applicable law, the Petition is denied.

Judge O'Brien would have granted the Petition.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

/s/ Lara Smith
by: Lara Smith
Counsel to the Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 5/21/13]

Case No. 12-4157-JAR-JPO

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
Defendants.

MEMORANDUM AND ORDER

This putative royalty owners class action suit was removed by Defendants Dart Cherokee Basin Operating Company, LLC ("DCBO") and Cherokee Basin Pipeline, LLC ("CBPL") to this Court on December 5, 2012 (Doc. 1). This matter is before the Court on Plaintiff's Motion to Remand (Doc. 12). The matter is fully briefed and the Court is ready to make its decision. For the reasons explained in detail below, the Court grants Plaintiff's motion and remands the case to the District Court of Wilson County, Kansas.

I. Background

On October 30, 2012, Plaintiff Brandon W. Owens filed a class action Petition in the District Court of Wilson County, Kansas. In the state court Petition,

Plaintiff seeks to represent a class of royalty owners who were underpaid royalties from DCBO or CBPL working interest Kansas wells from January 1, 2002 to the date of the Class Notice. Plaintiff alleges breach of contract and unjust enrichment claims and seeks compensatory damages, costs, and such further relief as the court deems just and proper. The Petition does not state a specific amount as damages.

On December 5, 2012, Defendants removed the state court action to this Court, asserting jurisdiction pursuant to 28 U.S.C. § 1332(d), commonly known as the Class Action Fairness Act of 2005 ("CAFA"). As grounds for removal, Defendants contend the amount in controversy is in excess of $8.2 million. On January 2, 2013, prior to any response being filed to the motion to remand, all further proceedings in the case were stayed pending mediation between the parties; mediation held on April 4, 2013, was unsuccessful, and the Court directed the parties to resume briefing on the pending motion.[1]

II. Discussion

To establish federal jurisdiction under CAFA, three elements are required. First, minimal diversity of citizenship must exist between the parties, meaning at least one plaintiff and one defendant must be citizens of different states. Second, the proposed class must have at least one hundred members in the aggregate. And third, the amount in controversy must exceed $5 million, exclusive of interest and costs.[2] For removal to be proper, the defendant must

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[1] Doc. 20. The Court also denied without prejudice to renew Defendants' pending Motions to Dismiss.

[2] 28 U.S.C. § 1332(d).

set forth facts supporting the assertion that the amount in controversy is satisfied.[3] In making this showing, the defendant must support the amount in controversy with factual evidence rather than mere assumption or speculation.[4] The parties are in dispute only about the third element—the amount in controversy.

In determining the amount in controversy for an action removed pursuant to CAFA, the question is not how much the plaintiff will recover, but "an estimate of the amount that will be put at issue in the course of the litigation."[5] The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal.[6] If the jurisdictional amount is not shown by the allegations of the complaint, "[t]he burden is on the party requesting removal to set forth, in the notice of removal itself, the 'underlying facts supporting [the] assertion that the amount in controversy exceeds [$75,000].'"[7] In other words, the amount in controversy must be affirmatively established on the face of either the petition or notice of removal.[8] The Court narrowly

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[3] *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012).

[4] *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001).

[5] *Frederick*, 683 F.3d at 1245.

[6] *Martin*, 251 F.3d at 1290; *Laughlin v. Kmart Corp.*, 50 F.3d 871, 872 (10th Air. 1995).

[7] *Laughlin*, 50 F.3d at 873 (quotation omitted).

[8] *Id.*

construes removal statutes,[9] and all doubts must be resolved in favor of remand.[10]

In *McPhail v. Deere & Co.*,[11] the Tenth Circuit outlined several methods that a removing defendant may use to satisfy its burden of proving jurisdictional facts by a preponderance of the evidence. A plaintiff "cannot avoid removal merely by declining to allege the jurisdictional amount," but in the absence of an explicit demand for more than the jurisdictional amount, defendant must show how much is in controversy through other means.[12] In other words, "the defendant must affirmatively establish jurisdiction by proving jurisdictional facts that made it possible that $75,000 was in play."[13] A defendant may accomplish this through interrogatories obtained in state court prior to the removal, or affidavits or other evidence submitted to the federal court.[14] In *Frederick v. Hartford Underwriters Ins. Co.*, the Tenth Circuit reaffirmed *McPhail* and extended the rationale to

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[9] *Martin*, 251 F. 2d at 1289.

[10] *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Air. 1982); *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237, 1241 (D. Kan, 2002).

[11] 529 F.3d 947 (10th Air. 2008).

[12] *Id* at 955.

[13] *Id.*

[14] *Id.* at 956. *Accord Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012) (explaining defendants may meet their evidentiary burden to show the jurisdictional amount in controversy, "by contentions, interrogatories or admissions in state court; by calculation from the complaint's allegations[;] by reference to the plaintiff's informal estimates or settlement demands[;] or by introducing evidence, in the form of affidavits from the defendant's employees or experts, about how much it would cost to satisfy the plaintiff's demands")

class actions under CAFA.[15] In that case, the Tenth Circuit definitively joined a number of Circuits in holding that a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5 million by a preponderance of the evidence.[16]

Because the Petition does not make a specific monetary demand for damages, the Court looks to the Notice of Removal. Defendants set forth, in relevant part:

> 9. Plaintiff's Petition does not state a specific amount as damages. It does, however, pray for payment of royalties and interest claimed to be due to royalty owners who were paid royalties with regard to gas produced from wells located in Kansas in which DCBO has owned any working interest, for the period from January 1, 2002 to the present. 12
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> 10. This matter involves approximately 700 wells that DCBO currently operates in Kansas. The purported class consists of royalty owners that own an interest in the wells in which DCBO has a working interest in Kansas. There are approximately 400 royalty owners with interests in the 700 wells at issue.
>
> 14. DCBO has undertaken to quantify the amount of additional royalties that would be owed if all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made.

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[15] 683 F.3d 1242, 1246-47 (10thCir. 2012).

[16] *Id* at 1246-47.

> 15. Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of $8.2 million.[17]

Defendants do not offer any documentation or affidavits explaining how they reached this calculation.

In their response to Plaintiff's motion to remand, Defendants offer the Declaration of Charles E. Henderson, Vice President of Legal Affairs and General Counsel for DCBO, and Manager of CBPL, which further outlines the calculations initially conducted, those that now exist based on limited informal discovery, and those performed by Plaintiff relating to the limited discovery.[18] According to Henderson, these calculations show that Plaintiff's claims for the entire class period far exceed the jurisdictional threshold. Henderson explains that, upon service of the Petition, which did not specify the amount in dispute, he undertook to quantify the damages at issue based on the allegations in the Petition, based on the claims, the class period and the number of leases. Assuming that the royalty paid to the Plaintiff class should have been calculated on 100% of the CBPL proceeds and not 75%, using a "back of the envelope" calculation, the class was underpaid by approximately $11 million. Using the same back of the envelope analysis, the claim for shrinkage is approximately $3.52 million. Subsequently, but before filing the Notice of Removal, DCBO located and analyzed the actual production and sales data for the period in question and ran a formal economic analysis of the potential damages, assuming the allegations in the Petition are correct.

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[17] Doc. 1.

[18] Doc. 23, Ex. 1.

Based on those assumptions, it was determined that the amount in controversy for the five year period prior to the filing of the Petition, which Defendants believe is the applicable period for Statute of Limitations purposes, was $8,224,798.62, and $11.86 million for the entire ten-year period claimed by Plaintiff class. Henderson attaches a spreadsheet setting forth this analysis.[19] Henderson also states that at the time of the mediation conducted April 4, 2013, Plaintiff's counsel and/or his expert witness had arrived at a damage figure in excess of $21.5 million, which included interest of $7.348 million. After deducting interest, the sum of the claims is over $14 million, almost three times the threshold jurisdictional amount.[20] Henderson notes that the $14 million figure is within 2% of the back of the envelope figures set forth above.

Plaintiff offers no affidavit, declaration or other evidence challenging Defendants' calculation, but instead argues that Defendants cannot meet their burden to show that it is more likely than not that the amount in controversy exceeds $5 million. Plaintiff asserts that Defendants submitted no evidence with their unsworn Notice of Removal, only a bare allegation that the amount in controversy exceeds the statutory requirement. Thus, Plaintiff argues, Defendants' Notice of Removal is deficient as a matter of law, and cannot be cured by attaching Henderson's Declaration to their response to Plaintiff's motion to remand. Plaintiff also takes issue with Defendants' use of the mediation to belatedly develop evidence to support its assertion of the amount in

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[19] *Id.* at Ex. A.

[20] *Id.* at Ex. C.

controversy, and in fact, DCBO had the information at the time of removal, but failed to offer it to prove the amount in controversy.

The Court finds several CAFA cases decided after *Frederick* to be informative. On remand from the Tenth Circuit, the district court in *Frederick* held that the defendant insurance company met its evidentiary burden under CAFA by submitting with its Notice of Removal the affidavit of its Director for Business Compliance, who attested to having overseen the extraction of data concerning relevant insurance claims and using it to calculate the company's potential liability.[21] The district court held that the defendant had "provided sufficient evidence, in the form of an affidavit, that Plaintiff s alleged actual damages are $2,960,998, and that an equal amount of punitive damages is possible in this case."[22]

Likewise, in *Ezell v. Graco Children's Products Inc.*, the court held that defendants' affidavit detailing their calculation of the amount in controversy was sufficient to show by a preponderance of the evidence that the amount exceeded $5 million.[23] In that case, plaintiffs brought a class action against manufacturers for sale of defective child booster seats.[24] Defendants submitted an affidavit in support of their Notice of Removal showing that:

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[21] *Frederick,* No. 11-cv-2306-WJM-KLM, 2012 WL 4511242, at *2 (D. Colo. Oct. 1, 2012).

[22] *Id.* at *4.

[23] No. Civ-12-787-C, 2012 WL 4355966, at *1 (W.D. Okla. Sept. 24, 2012).

[24] *Id.*

> 15,452 people with Oklahoma addresses registered booster seats within the time frame set out in the state court Petition.
>
> Defendants further develop their proof by setting forth the number of booster seats sold, 12, 200,000 and the portion of that number registered, 1,600,000. Applying this same ratio of registration seats sold (13%), it is reasonable to infer that approximately 118,500 seats were sold in Oklahoma. Plaintiffs seek recovery of the replacement cost of the seat. The parties agree that a blended price is $33.99.[25]

The court held that this evidence was sufficient to show that the compensatory damages could total over $3.9 million, which, when added to the potential punitive damages, would reach the necessary amount.[26]

And, in *Parks v. USAA*, plaintiffs brought a class action against defendant insurance companies alleging they violated Colorado law by arbitrarily reducing claims, improperly denying claims, conducting insufficient utilization reviews, and using incorrect schedules to calculate the value of claims.[27] In their Notice of Removal, the defendants offered as value of the contested claims the declaration of a Staff Claims Advisor asserting that during the three years prior to the filing of the complaint, there were over 500 individuals who would qualify for the plaintiff class with claims totaling over $2.5 million.[28] The

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[25] *Id.*

[26] *Id.*

[27] No. 12-cv-2016-PAB-MJW, 2012 WL 5290170, at *1 (D. Colo, Oct. 26, 2012).

[28] *Id.*

declaration states that the claims advisor has "knowledge and access to relevant corporate records and data systems" and that she has "undertaken an analysis of the business records and data systems" in order to arrive at the figures she provides.[29] Further, defendants offered several declarations asserting that the amount of attorney's fees will likely reach $1 million, and concludes that doubling the value of unpaid claims and adding interest and attorney's fees demonstrates that the amount in controversy exceeds $5 million, before the possibility of exemplary damages is taken into account.[30] The court held that, although the affidavit was not as detailed as those submitted in *Frederick* and *Ezell* in its description of the method used to derive the number of claimants and the value of the claims at issue, it was sufficient to meet defendant's evidentiary burden under CAFA, when plaintiff had not offered any facts showing that an award of $5 million or more is legally impossible.[31]

By contrast, in this case, Defendants do not submit any supporting documentation, affidavit or declaration as evidence of the amount of compensatory damages, even though they concede that they had the actual production and sales data at the time of the Notice of Removal, going so far as to run a "formal economic analysis of potential damages." Instead, Defendants argue, the amount in controversy can be demonstrated by the allegations in the Petition alone, and they have made their calculations from those allegations, along with additional facts. Defendants cite in support the Tenth Circuit's decision in *McPhail,*

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[29] *Id.*

[30] *Id.*

[31] *Id. at* *3

in which they contend the court held the allegations of the complaint alone was sufficient to find the amount in controversy exceeded the jurisdictional threshold for diversity jurisdiction.[32] Defendants' reliance on *McPhail* is misplaced. In that case, plaintiff brought a wrongful death action against defendant; her complaint cited to the Oklahoma wrongful death statute, and requested "all relief enumerated therein."[33] That statute provided recovery for several categories of compensatory damages alleged in the complaint, as well as punitive damages up to $100,000.[34] The court held that, "[Oven these allegations and the nature of the damages sought, the complaint on its face *may* be sufficient by itself to support removal."[35] The court declined to decide the question based on the complaint alone, however, because plaintiff had incorporated correspondence between counsel in the notice of removal that demonstrated her counsel believed the amount in controversy "very well may be" in excess of $75,000.

In this case, Plaintiff's Petition does not include a claim based on statutory liability or a claim for punitive damages, and the jurisdictional amount is not readily apparent from the face of the Petition. Nor does Plaintiff attempt to limit the amount in controversy to less than the jurisdictional amount. Although Defendants state in the Notice of Removal that they have "undertaken to quantify the amount of additional royalties that would be owed," Defendants fail to incorporate any evidence supporting this

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[32] 529 F.3d at 957.

[33] *Id.*

[34] *Id.*

[35] *Id.* (emphasis added).

calculation in the Notice of Removal, such as an economic analysis of the amount in controversy or settlement estimates. Accordingly, in the absence of such evidence, the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million.[36]

Thus, the Court turns to whether Defendants can rely on factual allegations not contained in the Notice of Removal, subsequently submitted with their response as "additional support" in an attempt to meet their jurisdictional burden. The Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy.[37] Defendants are correct that in *McPhail*, the Circuit appears to have carved out a limited exception to this rule, by holding that a party may seek limited discovery to determine the amount in controversy.[38] The Circuit did not give any guidance on when it is appropriate to grant or deny a request, however, and in that case, the court appears to have contemplated a situation in which the defendant had

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[36] *See Freebird, Inc. v. Merit Energy Co.*, 597 F. Supp. 2d 1245, 1249 (D. Kan. 2009) (citing *Coca-Cola Bottling of Emporia, Inc. v. South Beach Bev. Co., Inc.*, 198 F. Supp. 2d 1280, 1285-86 (D. Kan. 2002)) (holding that an affidavit including no underlying data, facts, figures or calculations in support" of blanket statement was insufficient to satisfy the removing defendant's burden of proving the amount in controversy).

[37] *See, e.g., Laughlin*, 50 F.3d at 873; *Martin*, 251 F.3d at 1291, n.4; *Okla. Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F. App'x 775 (10th Cir. 2005).

[38] 529 F.3d at 954.

no information from which to establish the amount of damages.[39]

Here, Defendant has not requested leave to conduct discovery on the amount in controversy. Indeed, such discovery is not justified, as Defendants concede in their response and Henderson's Declaration that they were aware of additional facts and data at the time they removed the case to federal court, but did not allege all of these facts in the Notice of Removal. And, although the *McPhail* court indicated that evidence of settlement proposals and estimates is permitted as a basis for establishing the amount in controversy, it is so only when those facts were incorporated in the notice of removal.[40] Although Plaintiff's Petition is silent on the jurisdictional amount, it has enough detail regarding the basis of the claims regarding the underpayment of royalties to enable Defendants to use their data to calculate an amount in controversy, albeit data and/or evidence they did not include in their Notice of Removal. Even assuming that Defendants can now establish the amount in controversy exceeds $5 million, they were obligated to allege all necessary jurisdictional facts in the notice of removal.[41]

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[39] *Id.* at 953; *Helvey v. Am. Nat. Life Ins. Co of Tex.*, No. 12-1109-MLB, 2012 WL 2149676, at 3, n.1 (D. Kan. June 13, 2012) (citing *McPhail,* 529 F.3d at 954) (granting removing party's request for limited discovery on past and future medical bills and attorney fees).

[40] *McPhail,* 529 F.3d at 956 (permitting district courts to consider settlement offers in assessing the jurisdictional amount and concluding that, "[t]o this end, documents that demonstrate plaintiff's own estimation of its claim are a proper means of supporting the allegation in the notice of removal").

[41] *See Freebird,* 597 F. Supp. 2d at 1249; *Benefits Tech., LLC v. Stanley,* No. 10-CV-0561-CVE-FHM, 2010 WL 4736297, at *5 (W.D. Okla. Nov. 16, 2010). Although Defendants do not move to

The jurisdictional facts alleged in the Petition and Notice of Removal do not show by a preponderance of the evidence that the amount in controversy exceeds $5 million. Guided by the strong presumption against removal, this case is remanded to state court for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that Plaintiffs Motion to Remand (Doc. 12) is GRANTED. The Clerk of the Court is directed to remand this case to the District Court of Wilson County, Kansas.

IT IS SO ORDERED.

Dated: May 21, 2013

/s/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

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amend their Notice of Removal, it does not appear that the Tenth Circuit would permit such amendment to provide art economic analysis of the amount in controversy that was absent in the notice of removal. *Id.* (citing cases).

APPENDIX D

THE DISTRICT COURT OF WILSON COUNTY, KANSAS SITTING IN FREDONIA

Case No. 2012 CV-68

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
Plaintiffs,

v.

DART CHEROKEE BASIN. OPERATING CO, LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
Defendants.

CLASS ACTION PETITION PURSUANT TO K.S.A. CHAPTER 60

COMES NOW Plaintiff, Brandon W, Owens, on behalf, of himself and all other similarly situated royalty owners, sues Defendants Dart Cherokee Basin Operating Co., LLC, and Cherokee Basin Pipeline, LLC for underpayment of royalties and alleges as follows:

1. This action is brought pursuant to Chapter 60 of the Kansas Statutes Annotated.

PARTIES

2. Plaintiff Brandon W. Owens is a citizen and resident of the Slate of Kansas, residing at 2334 Co. Rd. 2800, Independence, Kansas 67301. Plaintiff is a royalty owner of Dart Cherokee Basin Operating Co„ LLC who operated or paid royalty from working interest production in wells known as the Owens 2-30 and Melander-Owens 2 wells.

3. Defendant Dart Cherokee Basin Operating Co., LLC ("Dart") is believed to be a Delaware corporation with its principal place of business In Michigan. Dart conducts regular and systematic business throughout the State of Kansas, as well as in Wilson County and Montgomery County, Kansas.

4. Cherokee Basin Pipeline, LAC ("Cherokee Pipeline") is believed to be a Delaware corporation with its principal place of business in Kansas. Cherokee Pipeline is a wholly owned subsidiary of Dart, and the entity through which Dart pays royalties to Plaintiff and the Class of royalty owners defined herein. At all times relevant, and for all relevant purposes. Cherokee Pipeline acted as an agent for Dart.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this claim pursuant to K.S.A. § 60-308(b)(A), (c), (E), and/or (F), because Defendants' acts giving rise to this suit were committed in the State of Kansas as more fully described above and below.

6. Venue is proper in this Court pursuant to K.S.A. §§ 60-603 and 60-604 because the cause of action arose in this County and Defendants conduct regular and systematic business in this County.

FACTS COMMON TO ALL ACCOUNTS

7. Defendants underpaid royalty owners by taking numerous deductions (via fees or volumetric) before the gas products were in marketable condition.

8. The above referenced deductions include, but are not limited to gathering, compression, dehydration, and/ or treatment deductions.

9. These deductions were hidden from. royalty owners, including the Plaintiff and Class, in that they were not revealed on their check stubs, and the deduction information arises from confidential gas contracts and accounting processes.

10. Defendants also deducted from payments to Plaintiff and the Class a conservation fee deduction. Such deductions were improper. Indeed, although they were not a tax, conservation fee deductions were deceptively lumped in as "taxes" on the cheek stubs of Plaintiff and the Class.

11. As a direct and proximate result of Defendants acts and/or omissions, Plaintiff and the Class have been injured/damaged.

CLASS ACTION ALLEGATIONS

12. Plaintiff brings this class action lawsuit on behalf of himself and the following similarly situated Class:

> All royalty owners who were paid royalties from Dart Cherokee Basin Operating Co., LLC or Cherokee Basin Pipeline, LLC working interest Kansas wells from January 1.2t}02 to the date of Class Notice.
>
> Excluded from the Class arc: (1) the Mineral Management Service (Indian tribes and the United States); (2) Defendants, their affiliates, predecessors, and employees, officers, and directors; and (3) any NYSE or NASDAQ listed company (and its subsidiaries) engaged in oil and gas exploration, gathering, processing, or marketing.

13. This lawsuit is brought pursuant to K.S.A. § 60-223.

14. The prerequisites of K.S.A. § 60-223, including numerosity, commonality, typicality, adequacy, predominance and/or superiority are satisfied.

15. Members of the Class are so numerous that joinder of all members is impracticable. Defendants operate over 500 wells in Kansas with one or more royalty owners for each well.

16. There are questions of law and fact common to the Class which predominate over questions affecting only individual members. These questions include, but are not limited to, the following:

a. Whether Plaintiff and the Class members are the beneficiaries of an implied covenant obligating Defendants to place the gas from class wells into marketable condition;

b. Whether Defendants are solely responsible for all costs necessary to render commercially marketable the gas produced under the oil and gas leases;

c. Determining the point at which the gas that Defendants produce becomes commercially marketable;

d. Whether Defendants deducted or allowed third parties to deduct (in cash or in kind) amounts for placing the gas into marketable condition before paying royalty to Plaintiff and the Class members;

e. Whether Defendants paid royalty to Plaintiff and the Class members based on a starting price below what Defendants received in arm's-length sales transactions for products in marketable condition;

f. Whether Defendants calculated the royalty paid to Plaintiff and the Class according to the internal accounting, royalty payment formulas, and record-keeping operations of Defendants which are not known or knowable by the members of the Class;

g. Whether the check stubs Defendants used in paying royalty to Plaintiff and the Class members misrepresented or fraudulently concealed, by omission, commission or both, the true facts about Defendants' calculation of royalty owed;

h. Whether Defendants' payment of royalty to Plaintiff and the Class members on a monthly basis is an open account; and

i. Whether Defendants deducted a conservation fee from Plaintiff and the Class members that it was not legally entitled to deduct.

17. The claims of the named Plaintiff are typical of the claims of the Class. All royalty owners faced the same type of accounting deductions and sales starting point regardless of lease types or gas composition from their wells.

18. Plaintiffs will fairly and adequately protect the interests of the Class. They have already retained Class counsel who are experienced and qualified in prosecuting class actions and other forms of complex civil litigation.

19. A class action under § 60-223 is superior to other available methods for the fair and efficient adjudication of this controversy because:

a. Plaintiff has the same interests as other members of the Class, is financially able to,

and will, vigorously prosecute this action on behalf of the Class;

b. It is desirable to concentrate the litigation involving claims of Kansas residents in this one forum because the expense and burden of the individual litigation make it impracticable for individual Class members to pursue separate litigation; and

c. No difficulties are likely to be encountered in the management of this litigation as a class action.

COUNT I

(Breach of Lease and Implied Covenant to Market)

20. Plaintiff incorporates all preceding paragraphs as if fully set forth herein.

21. As a result of the above-referenced conduct, Defendants have breached the lease, including the implied covenant to market imposed on each lease, to each member of the Class to produce and market at its sole cost the gas by placing the gas in a marketable condition.

22. Defendants have caused damages to Plaintiff and the Class in the amount of the improper deductions.

WHEREFORE, Plaintiff and the Class pray for judgment in their favor and against Defendants in a fair and reasonable amount to compensate them for damages they have suffered and will suffer up to the time of trial, for their costs in this action, and for such other and further relief as this Court deems just and proper.

COUNT II

(Unjust Enrichment)

23. Plaintiff incorporates all preceding paragraphs as if fully set forth herein.

24. Plaintiff and the Class are royalty owners of certain oil/gas wells.

25. Defendants were to pay Plaintiff and the Class royalties for the oil/gas retained by Defendants from the Plaintiff's and the Class' wells, such as fuel and lost and unaccounted for gas ("FL&U").

26. Defendants retained significant sums of money from Plaintiff and the Class through the above-referenced fees and deductions.

27. The above-referenced fees and deductions were unlawful, inequitable, and unauthorized by Plaintiff and the Class.

28. As a direct result of the misconduct alleged herein, Defendants have been unjustly enriched and have obtained a substantial monetary benefit which, in fairness and equity, Defendants were not entitled to receive or retain.

29. It would be unfair and inequitable to allow Defendants to retain the benefit derived from the above-referenced fees and deductions retained from Plaintiff and the Class and, therefore, Plaintiff and Class members are entitled to be paid and to receive those benefits.

WHEREFORE, Plaintiff prays for judgment in their favor and against Defendants in a fair and reasonable amount to compensate them for damages they have suffered and will suffer up to the time of trial, for their

costs, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ John F. Edgar

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Attorneys for Plaintiffs

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/5/12]

USDC Case No: 12-4157-JAR

Wilson County District Court
Case No. 2012-CV-68

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO., LLC
AND CHEROKEE BASIN PIPELINE, LLC,
Defendants,

NOTICE OF REMOVAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§1441(a) and 1446 and D.Kan. Rule 81.1, Defendants Dart Cherokee Basin Operating, Company LLC ("DCBO") and Cherokee Basin Pipeline, LLC ("CBPL") hereby remove to this Court the state court action described below.

1. On October 30, 2012, an action was commenced in the Thirty-First Judicial District, the District Court of Wilson County, Kansas, at

Fredonia, captioned *Brandon w. Owens, Individually and on Behalf of all Others Similarly Situated v. Dart Cherokee Basin Operating, Co. LLC and Cherokee Basin Pipeline, LLC,* bearing Case No. 2012-CV-68.

2. On November 5, 2012, DCBO was served with Summons and a copy of Plaintiff's Petition by process server on The Corporation Company, Inc., its agent for service of process, 112 S.W. 7th Street, Suite 3C, Topeka, KS 66603. A copy of the Petition served upon Corporation Service Company in the state court action and a copy of the summons filed therein are attached hereto as Exhibit A.

3. On November 5, 2012, CBPL was also served with Summons and a copy of Plaintiff's Petition by process server on The Corporation Company, Inc., its agent for service of process, 112 S.W. 7th Street, Suite 3C, Topeka, KS 66603. A copy of the Petition served upon Corporation Service Company in the state court action and a copy of the summons filed therein are attached hereto as Exhibit B.

4. The Clerk of the District Court of Wilson County, Kansas, has entered an Order extending the time within which Defendants may answer or otherwise plead to the Petition. A copy of said Order is attached hereto as Exhibit C.

5. This is a civil action of which this Court has original jurisdiction under 28 U.S.C. §1332(d), and it is one which may be removed to this Court by Defendants pursuant to the provisions of 28 U.S.C, §1441.

6. Plaintiff Brandon W. Owens is a citizen and resident of the State of Kansas. Petition, ¶ 2.

7. Defendant DCBO is a limited liability company organized under the laws of the state of Delaware, with its principal place of business in Michigan. DCBO's sole member is Dart Oil & Gas Corporation, a Michigan corporation with its principal office in Michigan.

8. Defendant CBPL is a limited liability company organized under the laws of the state of Delaware, with its principal place of business in Michigan. CBPL has two members: Dart Oil & Gas Corporation, a Michigan corporation with its principal office in Michigan and Gas Authority Supplies LLC (GAS), a Georgia limited liability company. GAS's sole member is the Municipal Gas Authority of Georgia, a Georgia Public Corporation created pursuant to act of the Georgia General Assembly. Both GAS and MGAG have their principal places of business in Georgia.

9. Plaintiffs Petition does not state a specific amount as damages. It does, however, pray for payment of royalties and interest claimed to be due to royalty owners who were paid royalties with regard to gas produced from wells located in Kansas in which DCBO has owned any working interest, for the period from January 1, 2002 to the present.

10. This matter involves approximately 700 wells that DCBO currently operates in Kansas. The purported class consists of royalty owners that own an interest in the wells in which DCBO has a working interest in Kansas. There are approximately 400 royalty owners with interests in the 700 wells at issue.

11. Plaintiff is a citizen of Kansas, Defendants are citizens of Delaware, Michigan, and/or Georgia for

diversity purposes. The class includes hundreds of citizens of Kansas and citizens of states other than Delaware, Michigan, and Georgia, There is the minimal diversity of citizenship required under 28 U.S.C. 1332(d).

12. Plaintiff claims that DCBO owes additional royalties because, among other things, DCBO (a) pays royalties based upon a below market price; (b) improperly deducts charges from the sales price for costs associated with gathering, compression, dehydration, and/or treatment before computing royalties; and (c) improperly shifts a portion of the conservation fee to royalty owners.

13. Plaintiff seeks to recover on behalf of a class of any royalty owner in any well located in Kansas in which DCBO has owned any working interest from January 1, 2002 to the present.

14. DCBO has undertaken to quantify the amount of additional royalties that would be owed if all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made.

15. Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of $8.2 million.

16. Defendants first received a copy of this Petition on November 5, 2012, when each was received by Defendants' statutory agents for service of process. This Notice is filed within 30 days of that date.

17. According to 28 U.S.C. § 1446(d), copies of this Notice have been served on counsel for plaintiff and filed with the Clerk of the District Court Wilson

County, Kansas. In addition, according to Local Rule 81.1, a copy of all pleadings filed in the State Court action are filed herewith.

WHEREFORE, Defendants pray that this action be removed to the United States District Court for the District of Kansas.

DESIGNATION OF TRIAL

COME NOW Defendants and designate the place of trial as Wichita, Kansas.

Date: December 5, 2012

Respectfully submitted by:

Morris, Laing, Evans, Brock & Kennedy, Chtd.

/s/ Julia Gilmore Gaughan
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Attorneys for Dart Cherokee Basin Operating Co., LLC and Cherokee Basin Pipeline, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2012, I electronically filed the foregoing Notice of Removal with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter,

I Further hereby certify that a true and correct copy of the above and foregoing was mailed this 5th day of December, 2012, via United States mail, postage prepaid, to:

John F. Edgar
Edgar law Firm, LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105

Rex A. Sharp
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5301 W. 75th St.
Prairie Village, KS 66208

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Coffeyville, KS 67337

Attorneys for Plaintiffs

/s/ Julia Gilmore Gaughan
Julia Gilmore Gaughan

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/19/12]

Case No. 12-CV-04157

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
Defendants.

PLAINTIFF'S MOTION TO REMAND

Plaintiff Brandon W. Owens, individually and on behalf of the proposed plaintiff class, moves to remand this royalty owners class action for underpayment of royalties to state court. The Defendants removed the case from state court claiming diversity jurisdiction under Class Action Fairness Act, 28 U.S.C. §1332(d), and under the procedures governing removal in 28 U.S.C. §1441. But Defendants have failed to demonstrate by competent evidence that the required amount in controversy has been met. Absent a showing in accordance with the law, this case should be remanded to state court.

Plaintiff incorporates his contemporaneously filed memorandum in support of this motion.

Respectfully submitted,

/s/ Rex A. Sharp

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Rex A. Sharp

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 12/19/12]

Case No. 12-CV-04157

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,
Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,
Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

This royalty owners class action was filed in state court and removed by the Defendants claiming diversity jurisdiction under the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1332(d). That statute requires, *inter alia*, that the amount in controversy exceed $5,000,000 exclusive of interests and costs. The state court petition is silent as to the amount in controversy. The Defendants have alleged, without any supporting proof whatsoever, that more than $5,000,000 is at issue. But, the burden is on Defendants, as the party asserting federal court jurisdiction, to establish the requirements for jurisdiction by a preponderance of the evidence. Because Defendants offered no evidence to support their assertion that the amount in controversy meets or exceeds the statutory threshold

of $5,000,000, Plaintiff moves to remand for lack of subject matter jurisdiction.

I. Background Facts

1. This case was filed as a class action in state court and removed by Defendants to this Court. Dkts. 1 & 1-1 at pp. 4-11.

2. The Notice of Removal claims jurisdiction "under 28 U.S.C. §1332(d)." Dkt. 1 at 2 ¶ 5.

3. Removal under that statute requires the amount in controversy be in excess of "$5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d) ("district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action").

4. There is no allegation of an amount in controversy in the state court petition. Dkt 1-1 at pp 4-11.

5. Without disclosing who calculated the amount in controversy, the data selected, the source of that data, or the method used, Defendants' Notice of Removal conclusorily states "the amount of additional royalty sought is in excess of $8.2 million." *See*, Doc. 1 at p. 4.[1]

6. Plaintiff denies that Defendants Notice of Removal demonstrates subject matter jurisdiction in accordance with the law.

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[1] "14. DCBO has undertaken to quantify the amount of additional royalties that would be owed if all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made.

Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of $8.2 million." Dkt. 1 at p. 4 ¶¶ 14-15.

II. Issue Presented

Does Defendants' bare allegation of the amount in controversy satisfy, by preponderance of the evidence, the amount necessary to establish federal subject matter jurisdiction in this Court? If not, the case must be remanded to state court.

III. Argument

The Tenth Circuit has held that the party invoking federal jurisdiction bears the burden of proving that jurisdiction exists. *Martin v. Franklin Capital Corp.*, 251 F.3d. 1284, 1290-91 (10th Cir. 2001). Moreover, "removal statutes are construed narrowly; where the plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." *Id.*

The settled Tenth Circuit law is that the "burden is on the party requesting removal to set forth, in the notice of removal itself, the *'underlying facts'* supporting [the] assertion that the amount in controversy [is met]." *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (emphasis in original). Indeed, "the rationale of *Laughlin* contemplates that the removing party will undertake to perform an economic analysis of the alleged damages supported by the underlying facts." *Archem v. Kelly,* 271 F. Supp. 2d 1320, 1322 (N.D. Okla. 2003); *Standard Liquor Corp. v. King Estate Winery Inc.*, No. 97-1503-JTM, 1997 WL 752643 at *1-.3 (D. Kan. 1997).

Additionally, the Tenth Circuit has been equally clear about the type of showing that is required in the notice of removal. Summary judgment type evidence is required to meet the amount in controversy burden of proof. *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008) (citing a Fifth Circuit case that "summary-judgment-type evidence" is required).

McPhail emphasized that a defendant might attach documents supporting an affidavit or introduce evidence from experts. *Id. See also Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir.1995) (removal "require[s] parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal"); *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997); *Evans v. Yum Brands, Inc.*, 326 F.Supp.2d 214, 220 (D.N.H. 2004).

Here, Defendants submitted no evidence, only a bare allegation that the amount in controversy exceeds the statutory requirement:

> 6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6). But a bare allegation is insufficient to make a showing under the statute: "[t]he party with the burden of proof cannot rely on conclusory allegations in an affidavit." *Fair v. Swanson,* 753 F.Supp. 875, 877 (D. Colo. 1991). This Court has previously applied this rule in granting a motion to remand in *Coca-Cola Bottling of Emporia, Inc. v. South Beach Beverage Co., Inc.,* 198 F.Supp.2d 1280, U82-84 (D. Kan. 2002). *Coca-Cola Bottling* specifically held that, under a preponderance of the evidence standard, a conclusory affidavit was insufficient to satisfy a defendant's burden of proving the amount in controversy needed to establish diversity jurisdiction:

> SoBe also attached to its response the affidavit of Richard MacLean, Senior Vice President of

> Business Affairs of SoBe, stating that lost profits would be greater than $75,000. *The affidavit includes no underlying data, facts, figures or calculations in support of this blanket statement*
>
> The additional assertions and facts proffered in SoBe's later filed response to Coca-Cola's motion to remand are untimely; SoBe should have addressed the underlying facts and should have attached any supporting affidavits to its Notice of Removal. Even if the Court considered the additional information proffered in SoBe's response to Coca-Cola's motion to remand, the Court would conclude that SoBe failed its burden of proving that the amount in controversy exceeds $75,000. *SoBe did not provide any facts, figures, data or calculations supporting the blanket assertions* that Coca-Cola's minimum volume would result in profits exceeding $75,000 *SoBe's affiant, Richard MacLean, failed to support his blanket statement about lost profits with any underlying data, facts, figures or calculations.*

Id. at 1282-84 (emphasis added). If a bare allegation in a sworn affidavit is insufficient, a bare allegation in an unsworn notice of removal must also be insufficient to establish subject matter jurisdiction.[2]

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[2] Subject matter jurisdiction is a critical threshold issue:

> [F]ederal courts are courts of limited jurisdiction, and the parties cannot confer jurisdiction where it is lacking. If the court lacks subject matter jurisdiction, all rulings are a nullity, lacking any force and effect. at some point the court will issue a ruling on the merits. That ruling will necessarily be adverse to one of the parties. At that point, losing counsel will be obligated to inform his or her client

This Court has recently so held in granting remand in *Butler v. Target Corp.*, No. 124092- SAC, 2012 WL 5362974 (D. Kan. Oct. 31, 2012) (slip op.). "Removal is proper on the basis of an amount in controversy asserted in the notice of removal if the district finds, by a preponderance of the evidence, that the amount in controversy exceeds the amount specified in" the governing statute. *Id.* at *3 (internal quotations omitted). In construing the recently enacted Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") and the Tenth Circuit's recent opinion in *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242 (10th Cir. 2012) (recognizing the JVCA "largely codified the holding of *McPhail*")[3], Judge Crow concluded Target's "conclusory allegations on the amount in controversy" in its notice of removal were insufficient under the JVCA and under Tenth Circuit law to meet its burden to establish jurisdictional facts by a preponderance of the evidence. *Butler*, 2012 WL 5362974, at *3 ("The defendant offers nothing from which the court would infer that these injuries, the expected medical treatment, the associated emotional distress and lost wages are of such seriousness that the total amount of money damages would be likely to exceed $75,000.00 The

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that a basis for appeal exists based on lack of subject matter jurisdiction.

Boeing Wichita Credit Union v. Wal-Mart Real Estate Business Trust, 370 F.Supp.2d 1128, 1129 (D. Kan 2005) (emphasis added).

[3] By its terms, the JVCA addresses diversity jurisdiction under 28 U.S.C. § 1332(a), not § 1332(d). But *Frederick* addresses CAFA diversity jurisdiction under 28 U.S.C. § 1332(d). Nothing suggests the two sections should be construed differently with respect to the legal analysis of the showing necessary to satisfy the statutorily prescribed amounts in controversy.

defendant must do more than point to the theoretical availability of certain categories of damages ."). The *Butler* court also found Target lacked an objectively reasonable basis for filing the notice of removal and stated it would award plaintiff fees and costs under 28 U.S.C. § 1447(c). *Id.* at 4-5. So it is here. Dart Cherokee's bare allegation that the amount in controversy exceeds the jurisdictional threshold in its notice of removal is insufficient to establish this Court's subject matter jurisdiction.

Nor can Defendants attempt to cure the insufficiency now.

> [T]he Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy, and the Tenth Circuit reaffirmed this rule in *McPhail. McPhail*, 529 F.3d 947, 957 (10th Cir.2008); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 Fed. Appx. 775 (10th Cir. Sep. 8, 2005); *Laughlin*, 50 F.3d at 873. In fact, the Tenth Circuit has expressly rejected the argument that a defendant may provide a post-removal economic analysis of the amount in controversy using facts outside of the petition or notice of removal. *Martin,* 251 F.3d at 1291 n. 4.
> There are no cases suggesting that the Tenth Circuit would permit a defendant to amend its notice of removal to provide an economic analysis of the amount in controversy that was absent in the notice of removal, especially when the request to amend the notice of removal is made after the plaintiff files a motion to remand.").

Benefits Technologies, LLC v. Stanley, 10-CV-0561-CVE-FHM, 2010 WL 4736297 (N.D. Okla. Nov. 16, 2010).

IV. Conclusion

Defendants' notice of removal proves no jurisdictional facts, is deficient as a matter of law, and cannot be cured. Having failed to establish subject matter jurisdiction, Plaintiffs motion for remand must be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Rex A. Sharp

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 05/01/13]

Case No. 12-CV-04157

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Defendants Dart Cherokee Basin Operating Company, LLC ("DCBO") and Cherokee Basin Pipeline, LLC ("CBPL") submit this memorandum in opposition to Plaintiff Brandon W. Owens's Motion to Remand (Doc. 12). Defendants have established through the Notice of Removal (Doc. 1) and Plaintiffs Complaint that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(d) and, accordingly, this matter should remain in the United States District Court for the District of Kansas. In support, Defendants state the following:

INTRODUCTION

Plaintiff is a royalty owner alleging that he is being underpaid for royalties from DCBO. Plaintiff is a Kansas citizen. Both defendants are citizens of other states. The Complaint alleges that, "Defendants operate over 500 wells in Kansas with one or more royalty owners for each well." *Complaint*, ¶ 15. In addition to himself, Plaintiff seeks to represent a class of similarly situated individuals. This class, as defined in the Complaint, would include "All royalty owners who were paid royalties from Dart Cherokee Basin Operating CO., LLC or Cherokee Basin Pipeline, LLC working interest Kansas wells from January 1, 2002 to the date of the Class Notice." *Complaint*, ¶ 12. Plaintiff did not include any information or allegation as to a total amount of damages sought nor did Plaintiff attempt to limit the damages sought. *See generally, Complaint.*

In the Notice of Removal (Doc. 1), Defendants set forth the parties' diverse citizenship and facts regarding the unstated amount in controversy based on the facts of Plaintiff's Complaint. Defendants set forth with specificity: the class period (over ten years), the number of wells (at least 700), the allegations regarding the alleged additional royalties owed arising from purportedly improper deductions, and that DCBO had undertaken initial efforts to quantify what additional royalties would be owed if the relief sought by Plaintiff was granted. These calculations, as set forth in the Notice of Removal, demonstrated that the relief sought would exceed $8.2 million. *Notice of Removal*, ¶¶ 9, 10, 12, 13, 14, and 15. This conservative figure even took into account the likelihood that the class would be unable to recover for the entire class period despite Plaintiff's allegations to the

contrary. *See Declaration of Charles E. Henderson*, attached hereto as Exhibit A, ¶ 7.

In his Motion to Remand, Plaintiff does not state that he is seeking less than the jurisdictional amount. Indeed, Plaintiff does not actually address Defendants' statements about the amount in controversy but half-heartedly categorizes Defendants' statements as "a bare allegation." As set forth more fully below, Defendants demonstrated with the Notice of Removal that the amount in controversy exceeds $5 million and no other basis exists for remand.

In additional support, Defendants attach the Declaration of Charles E. Henderson, *Exhibit A*, which further outlines the calculations initially conducted, those that now exist based on limited informal discovery, and the calculations performed by Plaintiff relating to the limited discovery. This additional information—all of which may be reviewed by the Court—further demonstrate that the amount in controversy exceeds $5 million. *See generally*, *Exhibit A.*

The calculations derived from the limited discovery are especially telling as the information produced was directly responsive to Plaintiff's requests. These calculations show that Plaintiff's claims for the entire class period far exceed the jurisdictional threshold. Plaintiff calculates damages of $21.5 million, which includes interest of $7.348 million. Plaintiff specifically claims underpaid royalty for the putative class in the amount of $10,427,969.01, a claim to improperly paid conservation fees totaling $97,816.33, and a claim for unpaid royalties due to shrinkage in the amount of $3,703,674.13. Without interest, Plaintiff's claims total $14,229,459, almost three times the jurisdictional threshold. *Exhibit A,* at ¶ 10. Moreover, the parties confirmed to the Court during a status

conference on April 30, 2013, that Plaintiff's settlement demands did not dip below the $5 million jurisdictional threshold during the course of mediation.

Plaintiff's motion to remand should be denied because Defendants have established, through the Notice of Removal, the face of the Complaint, and through limited discovery, that the amount in controversy exceeds $5 million.

ARGUMENTS AND AUTHORITIES

I. Standard of Review

Defendants removed this action pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1332(d). Plaintiff alleges that the only defect in the removal lies with the amount in controversy. In reviewing a motion to remand, the removing party bears the burden in demonstrating that removal is appropriate. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). Refusing to set forth a monetary demand for damages is insufficient to prove that the amount in controversy cannot be met. *McPhail v. Deere & Co.*, 529 F.3d 947, 955 (10th Cir. 2008).

II. Defendants Have Established that the Amount In Controversy Exceeds $5 Million Based on the Notice of Removal and the Face of the Complaint.

In determining the amount in controversy for an action removed pursuant to the Class Action Fairness Act ("CAFA," found in 28 U.S.C. § 1332(d)), the question is not how much the plaintiff will recover, but "an estimate of the amount that will be put at issue in the course of the litigation." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). When, as here, the plaintiff does not seek to recover a specified amount of damages, it is

appropriate for the removing party to assert the amount in controversy. 28 U.S.C. § 1446(c)(2). It is also appropriate for the Court to evaluate the amount in controversy based on the face of the Complaint. *McPhail v. Deere & Co.*, 529 F.3d 947, 955-56 (10th Cir. 2008)

In *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541-42 (7th Cir. 2006), the court set out what a removing defendant can do to establish the amount in controversy: "We have suggested several ways in which this may be done—by contentions, interrogatories or admissions in state court; by calculation from the complaint's allegations; by reference to the plaintiffs informal estimates or settlement demands; or by introducing evidence, in the form of affidavits from the defendant's employees or experts, about how much it would cost to satisfy the plaintiffs demands." (internal citations omitted).

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") amended 28 U.S.C. § 1446 regarding the procedure for removal and, as set forth above, specifically addresses removal based on diversity jurisdiction. Section 1446(c)(2) states:

> 2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that-
>
> (A) the notice of removal may assert the amount in controversy if the initial pleading seeks—
>
> (i) nonmonetary relief; or
>
> (ii) a money judgment, but the State practice either does not permit demand for a specific

> sum or permits recovery of damages in excess of the amount demanded; and
>
> (B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

In *Frederick vs. Hartford Underwriters Ins. Co.*, 683 F3d. 1242, (10th Cir. 2012) the Court of Appeals for the Tenth Circuit reaffirmed *McPhail* and extended the rationale to class actions under CAFA stating:

> We join the latter set of courts, and hold that a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5,000,000 by a preponderance of the evidence. In doing so, we extend our precedent in *McPhail* to the CAFA context and align ourselves with the majority of other circuits which have adopted the preponderance standard. *See generally, McPhail*, 529 F.3d at 954-55 (explaining the rationale behind the preponderance standard). Specifically, we agree that there is "no logical reason why we should demand more from a CAFA defendant" than other parties invoking federal jurisdiction. *Bell*, 557 F.3d at 957. This is especially so in light of the recently passed JVCA, which largely codified the holding *of McPhail*. *See* Pub. L. No. 112-63, 125 Stat. 758 (2011). By adopting the preponderance standard, we ensure that defendants seeking removal face the same burden regardless of whether they are invoking simple diversity jurisdiction or CAFA jurisdiction.

Id. at 1246-47.

In the instant case, the Petition filed in state court contained no allegation as to the amount in controversy or any claim as to the amount of damages being claimed. Under the JVCA therefore Defendants were entitled to assert the amount in controversy as part of their Notice of Removal which they did. The amount so asserted, as can be seen from the facts asserted in the Notice of Removal and herein will either be uncontested or is, at a minimum, sufficient to establish the operative jurisdictional facts by a preponderance of the evidence. *Id.* at 1248.

Defendant relies on inapplicable cases. In *Laughlin*, the removing defendant did not set forth an amount in controversy but incorporated by reference the plaintiff's demand for relief: "in excess of $10,000 for each of two claims." *Laughlin*, 50 F.3d at 873. Without more in the notice of removal, the defendant could not establish that the amount in controversy requirement had been met. *Id.* Similarly, in *Butler v. Target Corp.*, 2012 WL 5362974 (D. Kan. Oct. 31, 2012), the defendant failed to establish *an* amount in controversy because the defendant did not set forth any allegations that the amount in controversy exceeded the sixty-thousand dollar demand in the plaintiff's complaint when 28 U.S.C. 1446(c)(2) states that "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy "

The allegations of the complaints alone in both *McPhail* and in *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295 (5th Cir. 1999) were sufficient for the courts to find that the amount in controversy exceeded the jurisdictional threshold for diversity jurisdiction. In *McPhail*, the plaintiff alleged in the complaint that she was seeking to recover for her husband's "'severe

bodily injuries' which in turn led to 'permanent and progressive injury' and his 'wrongful death.'" *Luckett*, 171 F.3d at 957. The plaintiff also incorporated the applicable wrongful death statute and any relief available under that statute. *Id.* The statute provided for recovery of "medical and burial expenses, the loss of consortium and the grief of the surviving spouse, the mental pain and anguish suffered by the decedent, pecuniary loss based on earning capacity, and grief and loss of companionship; it also permits an award of punitive damages." *Id.* The court determined that from the complaint alone, that the amount in controversy exceeded the jurisdictional amount despite the absence of an allegation as to the amount of recoverable damages. *Id.*

In *Luckett*, the complaint included a demand for damages for "property, travel expenses, an emergency ambulance trip, a six day stay in the hospital, pain and suffering, humiliation, and her temporary inability to do housework after the hospitalization." *Luckett*, 171 F.3d at 298. Without more, this alone was sufficient to establish that the amount in controversy threshold had been met. *Id.*

Here, because Plaintiff made no monetary demand for damages in the initial Petition, Defendants set forth in the Notice of Removal the amount of damages they determined were placed in dispute and claimed by the Plaintiff class, based on the complaint's allegations and provided the Court with additional facts supporting their assertion that the amount in controversy exceeds $5 million. Defendants provided sufficient information in the Notice of Removal, whether under *Meridian*, *McPhail* or the JVCA to demonstrate that the amount in controversy requirement has been met.

When evaluating the face of Plaintiff's complaint alone, it is also apparent that the amount in controversy requirement has been met. Plaintiff alleged class-wide damage for over a decade for over 500 wells from which royalties for natural gas were underpaid. Similar cases have been brought with frequency (by Plaintiff's counsel) in the state and federal courts of Kansas, with settlements confirmed in amounts frequently exceeding $5 million. *See e.g.*, *Eatinger v. BP America Production Co.*, Case No. 07-1266-EFM-KMH pending in the United States District Court for the District of Kansas, wherein a class settlement was approved that included a cash payment of $19 million; *Hershey v. ExxonMobil Oil Corp.*, Case No. 07-1300- JTM-KMH pending in the United States District Court for the District of Kansas, wherein a class settlement was approved that included a cash payment of $54 million. The amount in controversy has been met as demonstrated by the face of Plaintiffs complaint alone and Plaintiff's counsel has not and cannot in good faith deny that fact to the Court.

III. Defendants' Supplemental Information May Be Considered by the Court and Further Demonstrates that the Jurisdictional Amount Has Been Met.

Plaintiff states in his Motion to Remand that any attempt to supplement the Notice of Removal would be moot, citing an unpublished district court opinion from Oklahoma. This is simply not the law. Since filing the original motion to remand, both parties have had an opportunity to more fully evaluate the amount at issue for the putative class.

In *McPhail*, the court highlighted the difficulty a defendant faces when a plaintiff fails to demand a set

amount of relief but defendants have an immovable deadline for the time to remove a matter to federal court. Citing *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536, 540-43 (7th Cir. 2006), the *McPhail* court identified that in addition to any calculations based on the complaint's allegations, a party may reference the plaintiffs non-numerical allegations and settlement demands or request use of the discovery process prior to a court ruling on a motion to remand so that limited discovery may be completed for the purposes of establishing the amount in controversy. *McPhail*, 529 F.3d at 954. ("We also note that to the extent that a defendant must rely on the federal discovery process to produce this evidence he may ask the court to wait to rule on the remand motion until limited discovery has been completed."). Here, the parties received a stay of this case while engaging in early settlement negotiations, which included limited discovery. This discovery supports the information outlined in the declaration attached hereto, which confirms that the amount in controversy exceeds $5 million.

McPhail also elaborates on the use of information from settlement discussions for the limited purposes of establishing the amount in controversy:

> Furthermore, a plaintiffs proposed settlement amount "is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiffs claim." *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir.2002). Acknowledging that the use of a settlement offer would not be permissible at trial as evidence to establish "'liability for or invalidity of the claim or its amount,'" the Ninth Circuit has held that it is permissible for a district court to consider

> settlement offers when deciding the jurisdictional question. *Id.* at n. 3 (quoting Fed.R.Evid. 408). We agree. The amount in controversy is not proof of the amount the plaintiff will recover. Rather, it is an estimate of the amount that will be put at issue in the course of the litigation. To this end, documents that demonstrate plaintiffs own estimation of its claim are a proper means of supporting the allegations in the notice of removal, even though they cannot be used to support the ultimate amount of liability.

McPhail, 529 F.3d at 956.

Indeed, here, as outlined in the attached Declaration, the calculations prepared by Plaintiff's counsel, based on the information requested by Plaintiff to prepare for mediation and from which Plaintiffs settlement demands were formulated, show that the amount in controversy greatly exceeds the jurisdictional threshold. *See Exhibit A,* ¶¶ 9-10. As part of the mediation process DCBO agreed to and did provide Plaintiff's counsel with documentation necessary for Plaintiffs counsel to fully analyze the liability and damage issues involved. Plaintiff's counsel and/or his expert arrived at a damage figure in excess of $21.5 million, including interest. The methodology and spreadsheets setting forth this information laid out Plaintiffs calculation of damages, including their claim for underpaid royalty of $10,427,969.01 (plus interest of $5,362,997.22), their Conservation fee claim of $97,816.33 (plus interest of $42,354.30) and their shrinkage claim of $3,703,674.13 (plus interest of $1,942,726.45). *See Declaration of Charles E. Henderson, Exhibit A).* The sum of the claims of the Plaintiff class as computed by Plaintiff's counsel,

without interest, is $14,229,459, which is within 2% of the back of the envelope figure stated above.

While these calculations are not proof of what Plaintiff might recover through the course of this litigation, it does demonstrate Plaintiff's own estimation of his claims in light of the discovery that has occurred about the nature and amount of Plaintiffs claims. Plaintiff estimates damages of nearly $15 million without interest, three times the jurisdictional requirement. Counsel confirmed to the Court during status conference that settlement demands at mediation did not dip below the jurisdictional threshold for CAFA. The amount in controversy in this case exceeds $5 million. The parties are diverse. This case meets the requirements for this Court to exercise jurisdiction pursuant to 28 U.S.C. § 1332(d). Should any remaining doubt exist, the Court can conduct a hearing under Rule 12(b)(1) at which point the parties can present evidence regarding the amount in controversy and jurisdiction. *See McPhail*, 529 F.3d at 954.

IV. The Court Should Reject Plaintiff's Unfounded Attempts to Avoid Federal Jurisdiction.

After setting out in the Notice of Removal the amount in controversy along with the underlying facts to support this amount, and upon review of the face of the Complaint, it is clear that the amount in controversy has been met. In *McPhail v. Deere & Co.*, 529 F.3d 947, 955 (10th Cir. 2008), the court explained that "a plaintiff cannot avoid removal merely by declining to allege the jurisdictional amount." Declining to allege the jurisdictional amount or otherwise blurring the jurisdictional amount for the purpose of forum shopping has repeatedly been rejected by the courts when a plaintiff seeks remand.

Plaintiffs are not permitted to avoid federal jurisdiction while still seeking to recover more than the jurisdictional threshold for diversity jurisdiction — they simply cannot have it both ways.

Let there be no doubt - that is exactly what Plaintiff's counsel in this case is trying to do. This is not Plaintiff's counsel's first royalty-owner class action lawsuit. In fact Plaintiff's counsel has made somewhat of a cottage industry of bringing class action claims on behalf of oil and gas royalty interest owners, and has consistently sought to avoid Federal courts. To do so, Plaintiff's counsel has set forth contingent damage demands or, as here, refused to set forth any amount as a demand. In one such instance Plaintiff's counsel filed two separate class action lawsuits in the same Kansas state court against the same defendants alleging different breaches of the same oil and gas leases on behalf of the same class of royalty owners. In *"Eatinger I" (Eatinger v. BP America Production Co.,* 524 F. Supp. 2d 1342 (D. Kan. 2007)), the class claims involved an alleged underpayment of royalties due to "self-dealing", the use of affiliate pricing to determine royalties. *Id.* at 1343. In *Eatinger I* the Plaintiff's state court petition stated with respect to the amount in controversy that:

> Plaintiff does not claim individually any damages in excess of $75,000 (including any damages or attorneys fees, prorated), and do not make a claim under any federal law. The entire class-wide damages may be less than $ 5 million.

Id. at 1348.

BP subsequently removed *Eatinger I* to Federal Court under the Class Action Fairness Act and

diversity jurisdiction. Notwithstanding the above allegation in the Petition, BP did its own calculation of the damages being sought by the class, based on the claims in the Petition and indicated in the Notice of Removal that:

> [B]ased on plaintiff Eatinger's proposed class definition, [BP] has calculated the minimum [3] amount of total royalty payments alleged to be in controversy to be at least $ 693,000,000. Therefore, unless plaintiff Eatinger is claiming less than a .7215009% underpayment of royalty on behalf of the proposed class, the amount in controversy exceeds $ 5,000,000.

Id. at 1344.

In attempting to remand *Eatinger I,* plaintiff's counsel "simply pled that the claims `may' be less than the required amount amount-in-controversy." *Id.* at 1348. He did not concretely claim less than the jurisdictional amount and he refused to stipulate to an amount in controversy below the jurisdictional threshold for the named Plaintiff or for the putative class. *Id.* at 1343. In finding remand was improper in *Eatinger I,* the court noted:

> [I]t appears that plaintiff is now attempting to have it both ways, in that it would like to remain in state court by pleading an amount below the requisite amount in controversy individually, while leaving the door open for the class to seek damages above the jurisdictional amount. This indecisive and ambiguous language is not sufficient to close the door to the federal courts.

Id at 1348.

Some four months after *Eatinger I* was filed, and while the motion to remand in *Eatinger I* was pending, the same counsel who filed *Eatinger I* (and this case) filed a second class action claim *("Eatinger II")* in the same Kansas state court on behalf of the same Plaintiff and Plaintiff class and against the same defendants. *Eatinger v. BP America Production Co.*, 2008 WL 4163250 (D. Kan. Aug. 26, 2008). *Eatinger II* involved claims that BP had breached its oil and gas leases by taking improper deductions, as opposed to the use of affiliate pricing. The Petition in *Eatinger II* replicated the claim in *Eatinger I* "that class-wide damages for unpaid royalties "may be less than $5 million." *Id.* After the Federal court issued an order denying the Motion to Remand in *Eatinger I* Plaintiff's counsel filed a First Amended Petition in *Eatinger*. The Court identified that the only difference between the original and first amended petition was that:

> Eatinger replaced the "may be less than $5 million" language with:
>
> Class-wide, Plaintiff does not seek or claim, based on presently available information, any right to recover in excess of $5 million. Should that information change, Plaintiff, on behalf of the class, will move for leave to amend to seek in excess of $5 million and consent to removal of this class action under the Class Action Fairness Act (since there is no 1 year removal time limit on CAFA diversity removal).

Id. at *1. Defendant BP removed the second action (as amended) to Federal court and then moved to consolidate the cases. Plaintiff's counsel again sought remand. The Plaintiff's attempts to work around federal jurisdiction were similarly inadequate. *Id.* Merely stating that the plaintiff does not presently

seek an amount in excess of the jurisdictional threshold, but will amend should it decide to do so is not a waiver of any right to recovery nor sufficient to provide the court with information that the amount in controversy is less than the jurisdictional amount. *Id.* at *2. In ruling on the motion to consolidate, the court also noted that the two cases, though they did contain minor differences, were clearly "closely related, triggering the application of the single-action rule, which is designed to 'protect the defendant from the necessity of litigating similar claims in separate actions.'" *Id.* at *3 (citing *Oxbow Energy v. Koch Industr.*, 686 F. Supp. 278, 282 (D. Kan. 1988)). The only rationale the court could discern for bringing two separate actions initially was the Plaintiff's "desire to evade both the single-action requirement and the jurisdictional standards of CAFA." *Id.* Indeed, despite Plaintiff's counsel's protestations that the amounts in controversy in both of the *Eatinger* cases "may" be less than the jurisdictional amount, the matter settled with a $19 million cash payment.

Plaintiff's counsel knows exactly how to plead his claim if he wants to preclude removal to Federal Court and avoid diversity jurisdiction and CAFA, as anyone who reads *Eatinger I* and *Eatinger II* knows. Notwithstanding that, Plaintiff's counsel did not state in the Petition filed in this matter that the claims involved were less than the jurisdictional threshold for diversity and CAFA, or even that the claims "may be" less than that amount. As the Court noted in *Eatinger II:*

> Certainly, as Eatinger stresses, the plaintiff is the "master" of his complaint. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005). But, where he uses that mastery to

> create mere ambiguity and evasion, he cannot be heard to complain too loudly. The court has previously noted, in *Eatinger I,* that the plaintiffs "indecisive and ambiguous language is not sufficient to close the door to the federal courts."

Id. at *2.

Here, Plaintiff's counsel has simply refused to state the amount in controversy in the Petition in an effort to avoid federal jurisdiction, and then in response to the Removal Notice has not attempted to stipulate or state that the damages sought by the Plaintiff class are below the jurisdictional threshold, or to provide any calculation to the Court to establish that his damage claim is in fact below the jurisdictional limit, but rather he has only argued that Defendants have not done enough to establish the amount in controversy.

As set forth above, the Notice of Removal and the face of the Complaint demonstrate that the amount in controversy exceeds $5 million. Faced with a Petition that contained no damage amount the Defendants were placed in a position of trying to determine what Plaintiff was seeking to recover. Based upon the allegations of the Petition it was possible to come up with a preliminary, "back of the envelope" damage analysis using total royalties paid, adjusting for the applicable contract rate, and further adjusting for the lost shrinkage amount. That analysis gènerated a damage figure of more than $14.5 million. *See Declaration of Charles E. Henderson, Exhibit A,* ¶¶-5-6. Defendants continued to gather data and did a formal economic analysis of the damage claim. This analysis *(id.* at Exhibit A thereto) determined that the damages claimed by Plaintiff class amounted to $11,866,260.25. If those "damages" which occurred

outside of the five-year period before the date of the filing of the Plaintiffs Petition are excluded the total damages claimed by Plaintiff class would be $8,224,798.62. *Id.* In the Notice of Removal, Defendants alleged that the damages claimed were "at least $8.2 million" This was not a number that was pulled out of thin air, it was in fact a very conservative number based on the analysis shown above.

The Notice of Removal and the statement contained therein that the amount in controversy is "at least $8.2 million" alone clearly satisfies the requirement for removal jurisdiction. In *McPhail,* the 10th Circuit acknowledged that a defendant may "rely on an estimate of the potential damages from the allegations in the complaint" alone to establish federal jurisdiction. *McPhail*, 529 F.3d at 956.

As noted in Section III, *supra*, the amount in controversy requirement can also be satisfied "by reference to plaintiff's informal estimates or settlement demands." *Id.* at 954. Such a rule is consistent with not allowing Plaintiff's counsel to "have it both ways" as the judge noted in *Eatinger I.* 524 F. Supp. 2d at 1348. Here Plaintiff's counsel's own damage calculations show in reality the amount in dispute is almost $15 million.

CONCLUSION

The initial notice of removal and a review of the face of the Complaint, coupled with the discovery conducted since the start of this suit, are more than sufficient to meet the removal requirements. As the *McPhail* court stated, once the facts supporting federal jurisdiction are presented the case will remain in federal court unless it is legally certain that less than the jurisdictional amount is in controversy. 529 F.3d

at 954. Plaintiffs counsel's attempts to avoid federal jurisdiction should be rejected. The facts set forth herein and the attachments hereto clearly meet the requirements of *McPhail*. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d) and Plaintiff's motion to remand should be denied.

Defendants properly removed this matter to federal court pursuant to this Court's ability to exercise jurisdiction under 28 U.S.C. § 1332(d). Accordingly, this Court should deny Plaintiffs Motion to Remand.

Submitted this 1st day of May, 2013.

Respectfully submitted by:

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Attorneys for Dart Cherokee Basin Operating Co., LLC and Cherokee Basin Pipeline, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Julia Gilmore Gaughan

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 5/1/13]

Case No. 12-CV-04157

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,

Defendants.

DECLARATION OF CHARLES E. HENDERSON

The undersigned, of lawful age deposes and states as follows:

1. My name is Charles E. Henderson and I am the Vice President of Legal Affairs and General Counsel for Dart Oil. & Gas Corporation, which is the sole member of Dart Cherokee Basin Operating Company, LLC ("DCBO") and the Manager of Cherokee Basin Pipeline, LLC ("CBPL"), the defendants in this matter. I have held that position since July, 1999.

2. As set forth in the Notice of Removal, upon service of the Complaint in this Matter the undersigned commenced a determination as to whether this matter was eligible for removal to

Federal Court. Because the Complaint did not specify. the amount in dispute DCBO undertook to quantify the amount of damages at issue in this case based on the allegations of the Complaint, including but not limited to the allegations that DCVO (a) pays royalties based upon a below market price; (b) improperly deducts charges from the sales price for costs associated with gathering, compression, dehydration, and/or treatment before computing royalties; and (c) improperly shifts a portion of the conservation fee to royalty owners.

3. The Complaint alleges that the Plaintiff class is entitled to damages for the period from "from January 1, 2002 to the date of the Class Notice" (see Complaint paragraph 12). This is a period of almost 11 years as of the tiling of the Complaint and continues to increase as the litigation continues. DCBO in computing the amount put in dispute by Plaintiff's complaint calculated damages from June 1, 2002, to the present. DCBO did not have an interest in the leases at issue until June 1, 2002 so it has no records and paid no royalties prior to that date.

4. In calculating the damages claimed by Plaintiff class, DCBO initially identified over 700 leases that were included within the proposed class, although continued review subsequently determined that 744 leases were at issue.

5. CBPL, pays DCBO a purchase price based on 75% of the price CBPL receives when it resells the gas to another purchaser. DCBO in tarn pays royalties to the Plaintiff class based upon the amount it receives from CBPL. The Plaintiff class had received royalties for the period June

1, 2002 to June 1, 2012 in the amount of $33,115,144.88 (see spreadsheet attached as Exhibit A). Assuming, as Plaintiff alleges, that the royalty paid to the Plaintiff class should have been calculated on 100% of the CBPL proceeds and not 75%, using a "back of the envelope" calculation, the Plaintiff class was underpaid by approximately $11 million [$33,115,144.88 divided by 75%= $44,153,525-$33,115,144= $11,038,381].

6. An additional component of the Plaintiff class' underpayment of royalty claim is for the "shrinkage" (primarily the amount of raw gas that is used to run compressors and treatment equipment between the point of purchase by CBPL and resale that is not available for re-sale by CBPL) that was allegedly improperly deducted from or not paid as part of the royalty payments to the Plaintiff class. Shrinkage has averaged just over 8% over the claim period. Using the same back of the envelope analysis the claim for shrinkage is approximately $3,520,000 [$44,153,525 x 8%= $3,52.0,000]. When combined with the prior underpaid royalty amount the amount of the Plaintiff class' claim, based on the allegations of the Compliant, was estimated at $14,520,000 for purposes of the amount in controversy analysis.

7. After doing the back of the envelope analysis, but before the filing of the Notice of Removal, DCBO was able to locate and analyze actual production and sales data for the period in question and to run a formal economic analysis of the potential damages being claimed by the Plaintiff class, assuming for purposes of the analysis that all

allegations of the Complaint are correct. Based on those assumptions it was determined that the amount in controversy for the five year period prior to the filing of Plaintiffs' Petition, which Defendant's believe is the applicable period for Statute of Limitation purposes, was $8,224,798,62 and $11,866,260.25 would have been due for the entire 10 year-period claimed by Plaintiff class (computed through June 2012 production and payment records, the most recent figures then available. (see spreadsheet attached as Exhibit A). The actual amount through the date of filing would be greater in both instances).

8. The Complaint claims entitlement to damages for a period of almost eleven years prior to the filing of the Complaint as well as for prospective damages. The Defendants believe that at most Plaintiff would be able to recover for the five-year period prior to filing suit to present due to the five-year statute of limitations applicable to any claims of Plaintiff class herein. A motion dismiss Plaintiffs claims for damages accruing more than five years prior to the filing of the Complaint was filed (Document No. 9) and will be re-filed once jurisdiction is resolved. In the Notice of Removal (Document No. 1) the amount in controversy was stated to be "in excess of $8.2 million" (Document No. 1, paragraph 16). This figure was based upon the Defendant's estimate of the damages claimed by the Plaintiff class for only the five year period prior to the filing of the complaint, a very conservative approach, rather than the ten year period the Plaintiff class is actually claiming. Had the entire period been used in the Notice of Removal, the amount in controversy; as

calculated at that time, would have been $11,866,260.25 (as shown in Exhibit A).

9. A short time after removal the parties agreed to pursue early settlement negotiations by means of a facilitative mediation. To make this mediation meaningful DCBO agreed to provide Plaintiff's counsel with documentation he felt would be necessary to allow him to be in a position to fully analyze the liability and damage issues involved. Plaintiff's counsel was in fact provided with all of the information he requested (see his request attached as Exhibit B) and based on that information would have been and apparently was able to compute the damages being claimed by the Plaintiff class.

10. By the time of the mediation (April 4, 2013) Plaintiff's counsel and/or his expert had in fact arrived at a damage figure which was in excess of $21,5 million, which figure included interest of $7.348 million (calculated at 10% per year over the 10 year period), and from which a settlement demand was derived. The methodology for arriving at this number was explained in "Exhibit E Part 4" of materials supplied by Plaintiff's counsel (See Exhibit C). The three spreadsheets also provided as part of Plaintiff's mediation statement (Parts 1,2, and 3 to Exhibit E to the Mediation Statement), laid out Plaintiff's calculation of damages, including the claim for underpaid royalty of $10,427,969.01 (plus interest of $5,362,997.22), the Conservation fee claim of $97,816.33 (plus interest of $42,354.30) and the shrinkage claim of $3,703,674,13 (plus interest of $1,942,726.45). Copies of the last page of Parts 1, 2 and 3 of

Exhibit E (each of which are 70,000+ line long spreadsheets) are attached as Exhibits D, F. and F respectively. The sum of the claims of the Plaintiff class, without interest, is $14,229,459, which is within 2% of the back of the envelope figure stated above. These figures are both almost three times the $5 million jurisdictional limit without even considering interest.

11. I declare under penalty of perjury that the above and foregoing is true and correct.

Further affiant sayeth not.

Date: April 30, 2013

/s/ Charles E. Henderson
Charles E. Henderson

CHEROKEE BASIN PIPELINE/DART OIL & GAS
PAYMENTS MADE TO KANSAS ROYALTY OWNERS (DOES NOT INCLUDE OKM)
Oil & Gas
PRODUCTION YEAR 2002-2012
By Lease Form Type

Lease Form #	2002 Owner Net $	2003 Owner Net $	2004 Owner Net $	2005 Owner Net $	2006 Owner Net $	2007 Owner Net $	2008 Owner Net $	2009 Owner Net $	2010 Owner Net $	2011 Owner Net $	2012 Owner Net $	Totals
1	5666.56	345938.83	915067.83	1199980.15	1637377.3	1842759.61	2155874.42	838554.6	932302.11	709508.12	167109.76	10709827.79
1-A	0	0	0	28336.87	209222.17	852 601.79	1604806.88	923779.6	1047778.06	834084.31	190271.66	5689081.28
2	190.4	1211.96	2517.24	2666	26426.1	73179.57	90607.8	16462.41	14344.65	6856.83	1203.72	197186.78
3	24744.11	197825.6	257542.41	278029.66	269652.35	230291.06	240423.65	89747.82	84407.02	74263.09	14541.81	1762655.48
4	1139.82	4985.02	11787.03	16951.57	15844.16	10226.1	11152.55	3475.24	2838.44	6206.28	1744.43	85171.54
5	8053.35	51354.32	137480.16	119468.76	407929.51	580774.84	652945.56	279831.22	273795.15	200411.15	44388.01	2980814.33
6	3464.26	9414.09	8314.39	11851.27	13582.31	10812.7	10895.69	4387.08	4583.82	4188.48	1071.95	84452.65
7	885.38	3749.5	3325.05	6843.02	7822.37	4753.95	7158.83	4708.47	4656.38	2834.54	774.08	47576.72
8	18225.56	52630.35	52874.43	250814.78	285422.71	165189.24	156481.53	56710.48	48990.6	32098.82	5341.02	1126852.5
9	2542.05	19901.29	28054.34	24131.63	20959.36	14881.42	17153.9	5500.48	5036.85	4728.17	1241.77	139143.74
10	829.08	25913.4	51224.67	54909.88	41065.11	42777.94	57972.58	49758.89	42994.04	35210.25	7105.43	424457.85
11	126.17	3128.38	9773.64	6795.89	8904.88	8128.94	8032.88	8181.6	8477.81	8234.87	725.29	81941.45
12	0	0	925.9	6830.68	6551.68	5348.88	8256.64	2486.68	2628.52	2048.87	435.2	34467.03
13	0	0	99919.23	104446.49	226883.87	203455.54	224351.08	89118.9	89418.28	90513.26	24147.4	1261871.06
14	0	0	2693.92	11976.05	9159.25	6464.66	6672.59	5285.88	4467.73	3055.54	679.18	50453.88
15	0	0	0	0	1114.91	10301.04	12253.02	5915.31	6298.44	4163.35	1002.17	40038.22
16	1713.29	24944.41	13377.51	15897.41	17300.14	7852.05	8834.99	7280.44	5845.48	7940.22	2914.27	117892.17
17	0	17258.12	37530.71	37054.42	26427.5	24478.39	92554.51	43373.49	41779.91	31447.43	8848.9	358753.78
18	0	0	17811.64	26144.89	24835.08	15965.22	17135.02	5195.18	5749.55	5823.59	1411.09	119852.14
19	0	25878.77	26766.79	24980.27	26977.29	24452.52	24390.43	8181.45	6440.43	4546.89	1125.22	171738.06
20	0	0	11189.43	7850.44	5134.78	3851.29	3572.58	1481.41	1452.69	1485.92	408.24	36526.28
21	0	0	21036.88	24499.45	12727.7	5439.72	8174.63	3923.47	3116.59	2775.27	908.29	85728.6
22	0	0	0	0	6160.77	71577.43	107280.89	110083.64	148508.92	132364.51	27890.36	606016.72
23	0	0	0	0	0	0	0	0	0	0	2817.18	2817.18
24	0	0	0	0	0	0	1843.79	7576.28	12825.4	9737.85	2920.87	34296.89
25	0	0	80293.69	269339.23	356455.11	853408.41	457748.64	184064.39	108524.62	144247.5	33547.89	2810480.56
26	0	0	0	0	0	0	2486.8	22106.07	12931.36	21718.21	4861.18	63851.6
27	0	0	0	95.97	2117.96	6401.02	6671.02	3055.22	3528.95	2263.42	842.14	25078.12
28	0	0	0	0	0	1530.9	4431.87	1378.86	1444.35	1185.65	357.78	10559.97
29	0	0	4309.28	20489.06	42019.61	73077.06	88227.74	44867.35	44583.73	38113.8	8796.84	364587.45
30	0	0	533.97	1648.29	18596.92	20582.42	28689.67	7255.47	570.49	0565	0	79482.87
31	0	0	0	0	29104.19	46371.59	130461.52	85355.08	55484.32	24431.82	4936.61	814205.59
32	0	1117.81	60152.92	159563.96	472464.77	774376.49	991078.13	564083.71	853685.08	275234.48	80350.03	3512037.43
dn/a	6341.47	22986.52	86239.05	76837.98	63460.16	69488.31	106864.85	37973.13	24570.08	10772.83	6330.18	502108.35
	$ 72,473.68	$ 799,018.18	$ 1,896,061.31	$ 3,118,460.18	$ 4,291,263.27	$ 5,556,680.26	$ 7,349,855.31	$ 3,228,683.58	$ 3,458,517.04	$ 2,780,075.10	$ 629,825.10	$ 33,115,144.89

This figure was derived by aggregating 2007-2012, dividing by the 75% figure received from the first rate, taking the difference from the two rates multiplied by 7.5% for shrinkage and adding the shrinkage to the difference.

This figure was derived by using the same calculation as highlighted above, but with the full 2003-2012 period.

Notes: Schedule reflects both oil and gas

$ 22,951,926.50 $ 30,009,901.85 $ 7,450,975.48 $ 8,224,798.62

Schedule reflects actual cash payments to owners after deducts
*2012 is thru the July check run (June Oil and May Gas)
dn/A represents wells that we no longer produce or operate

$ 33,115,144.88 $ 44,158,526.51 $ 11,058,981.63 $ 11,894,280.23

Dart/Cherokee

After reviewing the documents and spreadsheet provided, the following steps were taken to calculate various deductions made to the royalty owners' revenue.

LOST, FUEL & UNACCOUNTED for gas (LF&U)

1. The data from files Bates stamped DART 000542 through DART 000552 were combined into one database.
2. The Gas Sales Volume Allocations were then subtracted from the Integrated Prod Gas Volumes to obtain the LF&U volumes for each well for each month. The resulting volumes are contained in Column F of the attached file titled DART LF&U Calculation.
3. The Southern Star Index price was used to value the gas. During the handful of months that no price was available for Southern Star, PEPL Index price was used.
4. The LF&U volume was the multiplied by the Index price and by an assumed royalty percentage of 12.5%. The results are the monetized value of the royalty owners' share of the LF&U. This data is in Column H of the attached file. Interest calculated at 10% simple is in Column L.

SALES VOLUME RETAINAGE

1. After reviewing the contracts supplied, I have concluded that most if not all of the gas produced and sold by Dart/Cherokee was on the basis of 70% of the WASP for the volume left after FL&U before November 1, 2003 and 75% of the WASP

for the volume left after LF&U after November 1, 2003.

2. Data from the above mentioned files were combined and organized into a file that contains the gas sales allocated volumes for each well for each month. This data is shown in Column D of the attached file titled DART RETAINAGE Calculation.

3. The Southern Star Index price was used to value the gas. During the handful of months that no price was available for Southern Star, PEPL Index price was used.

4. The gas sales volume was multiplied by the Index price and by the retainage percentage and by an assumed royalty percentage of 12.5%. The results are the monetized value of the royalty owners' share of the volume and value retained by the gatherer/purchaser for the services provided. This data is in Column F of the attached file. Interest calculated at 10% simple is in Column J.

CONSERVATION FEE

1. Data from the above mentioned files were combined and organized into a file that contains the gas sales allocated volumes for each well for each month. This data is shown in Column D of the attached file titled CONSERVATION FEE Calculation.

2. The Kansas Conservation fee of $0.00913 per mcf prior to January 1, 2007, and $0.0129 per mcf after January 1, 2007, was entered into Column E.

3. The gas sales volume was multiplied by the conservation fee and then by an assumed royalty rate of 12.5%. The results are the conservation fee deducted from the royalty owners for each well by month. This calculation is in Column F of the attached file. Interest calculated at 10% simple is in Column J.

Prod Date	Lease Name	Lease Number	Gas Sales Volume Allocations (MMBTU)	Southern Star Index	RO Value of Retainage (12.5%)	Interest at 10% Simple thru 4-1-13
6/1/2002	Horner E	15000-014	0.00	3.08	0.00	0.00
6/1/2002	Lavley C	15000-021	0.00	3.08	0.00	0.00
6/1/2002	Lavley D	15000-023	0.00	3.08	0.00	0.00
6/1/2002	Lentz	15000-027	152.94	3.08	17.66	19.14
6/1/2002	Wise	15000-058	0.00	3.08	0.00	0.00
6/1/2002	Gutschenritter	15000-013	764.68	3.08	88.32	95.68
6/1/2002	Mustain	15000-034	0.00	3.08	0.00	0.00
6/1/2002	Mahaffey	15000-031	234.70	3.08	27.11	29.37
6/1/2002	Bollinger 03	3rd Party	0.00	3.08	0.00	0.00
6/1/2002	Perkins	15000-039	308.14	3.08	35.59	38.56
6/1/2002	Howard	15000-015	31.04	3.08	3.59	3.88
6/1/2002	Thompson	15000-051	0.00	3.08	0.00	0.00
6/1/2002	Gordon	15000-012	132.49	3.08	15.30	16.58
6/1/2002	Farris	15000-011	110.54	3.08	12.77	13.83
6/1/2002	J. Scott	15000-042	224.86	3.08	25.97	28.14
6/1/2002	Turner	15000-052	0.00	3.08	0.00	0.00
6/1/2002	Adee	15000-001	46.94	3.08	5.42	5.87
6/1/2002	Steinberger 83-10	15000-050	8.33	3.08	0.96	1.04
6/1/2002	Burck	15000-006	480.76	3.08	55.53	60.16
6/1/2002	White	15000-056	40.13	3.08	4.63	5.02
6/1/2002	Lee Wright	15000-025	0.00	3.08	0.00	0.00
6/1/2002	Botts	15000-004	314.96	3.08	36.38	39.41
6/1/2002	Dougherty 9-B	15000-010	1,631.57	3.08	188.45	04.15
6/1/2002	Oakhurst Farms	15000-038	74.20	3.08	8.57	9.28
6/1/2002	McDaniels	15000-032	56.03	3.08	6.47	7.01
6/1/2002	Howard B	15000-016	0.00	3.08	0.00	0.00
6/1/2002	Donna Lee	3rd Party	0.00	3.08	0.00	0.00
6/1/2002	Pierce 1	15000-041	76.47	3.08	8.83	9.57
6/1/2002	Leady	15000-024	0.00	3.08	0.00	0.00
6/1/2002	Scott A	15000-044	556.75	3.08	64.54	69.91
6/1/2002	Scott B	15000-045	372.50	3.08	43.02	46.61
6/1/2002	Dougherty 4-A	15000-008	0.00	3.08	0.00	0.00
6/1/2002	Mustang B	15000-035	349.03	3.08	40.31	43.67
6/1/2002	Smith	15000-048	0.00	3.08	0.00	0.00
6/1/2002	Lentz B	15000-027	181.71	3.08	20.99	22.74
6/1/2002	White II	15000-056	22.71	3.08	2.62	2.84
6/1/2002	Buckles	15000-005	175.85	3.08	20.29	21.98
6/1/2002	Jensen	15000-017	80.25	3.08	9.27	10.04
6/1/2002	Smith A/Sycamore Springs	15000-047	77.98	3.08	9.01	9.76
6/1/2002	Worl	15000-060	25.74	3.08	2.97	3.22
6/1/2002	New Master	15000-037	0.00	3.08	0.00	0.00
6/1/2002	B.N. Lies	15000-029	0.00	3.08	0.00	0.00
6/1/2002	C. Smith	15000-049	0.00	3.08	0.00	0.00

11/1/2012	Bright Futures/Johnson 3rd Party	z090200.0054.000	905.36	3.26	92.23	3.84
11/1/2012	Fidelity/Janzen 3rd Party	z090200.0055.000	0.00	3.26	0.00	0.00
11/1/2012	Fidelity/Patterson 3rd Party	z090200.0056.000	0.00	3.26	0.00	0.00
11/1/2012	Searchers/Ward Family Trust 34 3rd Pa	z090200.0057.000	0.00	3.26	0.00	0.00
11/1/2012	CEP/Sec 29 3rd Party	z090200.0058.000	15,288.01	3.26	1,557.47	64.89
11/1/2012	CEP/Sec 3 3rd Party	z090200.0059.000	5,820.73	3.26	592.99	24.71
11/1/2012	CEP/Sec 26 3rd Party	z090200.0060.000	2,172.32	3.26	221.30	9.22
11/1/2012	CEP Sec 31 3rd Party	z090200.0061.000	3,389.07	3.26	345.26	14.39
11/1/2012	Bright Futures/Scott 3rd Party	z090200.0062.000	2,145.36	3.26	218.56	9.11
11/1/2012	PostRock/Schwatken 3rd paty	z090200.0065.000	1,319.01	3.26	134.37	5.60
11/1/2012	Jako/Wells 3rd Party	z090200.0081.000	905.36	3.26	92.23	3.84
11/1/2012	Jako/Tate 3rd Party	z090200.0082.000	426.66	3.26	43.47	1.81
11/1/2012	Jako/Puckett 3rd Party	z090200.0083.000	0.00	3.26	0.00	0.00
11/1/2012	Vaughn/Vaughn 1 3rd Party	z090200.0086.000	1,108.00	3.26	112.88	4.70
11/1/2012	ADR Oper/Bridwell 3rd Party	z090200.0088.000	191.48	3.26	19.51	0.81
11/1/2012	ADR Oper/Greer 3rd Party	z090200.0092.000	0.00	3.26	0.00	0.00
11/1/2012	ADR Oper/Yakshaw Trust 5 3rd Party	z090200.0094.000	326.27	3.26	33.24	1.38
11/1/2012	ADR Oper/Yakshaw 2 3rd Party	z090200.0095.000	244.47	3.26	24.91	1.04
11/1/2012	PostRock/Loether 3rd Party	z090200.0097.000	0.00	3.26	0.00	0.00
11/1/2012	PostRock/Schwatken 11-1 3rd Party	z090200.0098.000	366.24	3.26	37.31	1.55
11/1/2012	PostRock/Schwatken 12-1 3rd Party	z090200.0099.000	607.91	3.26	61.93	2.58
11/1/2012	PostRock/Schwatken 14-1 3rd Party	z090200.0100.000	1,455.85	3.26	148.29	6.18
11/1/2012	Cunningham Energy 3rd Party	z090200.0101.000	0.00	3.26	0.00	0.00
11/1/2012	Cunningham Crude 3rd Party	z090200.0102.000	40.90	3.26	4.17	0.17
			65,348,082.00		$10,427,969.01	$5,362,997.22

Prod Date	Lease Name	Lease Number	Gas Sales Volume Allocations (MMBTU)	Conservation Fee Rate per Mcf	Conservation Fee Attributable to Royalty Owners	Interest at 10% Simple thru 4-1-13
6/1/2002	Horner E	15000-014	0.00	$0.00913	0.00	0.00
6/1/2002	Lavley C	15000-021	0.00	$0.00913	0.00	0.00
6/1/2002	Lavley D	15000-023	0.00	$0.00913	0.00	0.00
6/1/2002	Lentz	15000-027	152.94	$0.00913	0.17	0.19
6/1/2002	Wise	15000-058	0.00	$0.00913	0.00	0.00
6/1/2002	Gutschenritter	15000-013	764.68	$0.00913	0.87	0.95
6/1/2002	Mustain	15000-034	0.00	$0.00913	0.00	0.00
6/1/2002	Mahaffey	15000-031	234.70	$0.00913	0.27	0.29
6/1/2002	Bollinger Oil	3rd Party	0.00	$0.00913	0.00	0.00
6/1/2002	Perkins	15000-039	308.14	$0.00913	0.35	0.38
6/1/2002	Howard	15000-015	31.04	$0.00913	0.04	0.04
6/1/2002	Thompson	15000-051	0.00	$0.00913	0.00	0.00
6/1/2002	Gordon	15000-012	132.49	$0.00913	0.15	0.16
6/1/2002	Farris	15000-011	110.54	$0.00913	0.13	0.14
6/1/2002	J. Scott	15000-042	224.86	$0.00913	0.26	0.28
6/1/2002	Turner	15000-052	0.00	$0.00913	0.00	0.00
6/1/2002	Adee	15000-001	46.94	$0.00913	0.05	0.06
6/1/2002	Steinberger B3-10	15000-050	8.33	$0.00913	0.01	0.01
6/1/2002	Burck	15000-006	480.76	$0.00913	0.55	0.59
6/1/2002	White	15000-056	40.13	$0.00913	0.05	0.05
6/1/2002	Lee Wright	15000-025	0.00	$0.00913	0.00	0.00
6/1/2002	Botts	15000-004	314.96	$0.00913	0.36	0.39
6/1/2002	Dougherty 9-B	15000-010	1,631.57	$0.00913	1.86	2.02
6/1/2002	Oakhurst Farms	15000-038	74.20	$0.00913	0.08	0.09
6/1/2002	McDaniels	15000-032	56.08	$0.00913	0.06	0.07
6/1/2002	Howard B	15000-016	0.00	$0.00913	0.00	0.00
6/1/2002	Donna Lee	3rd Party	0.00	$0.00913	0.00	0.00
6/1/2002	Pierce 1	15000-041	76.47	$0.00913	0.09	0.09
6/1/2002	Leady	15000-024	0.00	$0.00913	0.00	0.00
6/1/2002	Scott A	15000-044	558.75	$0.00913	0.64	0.69
6/1/2002	Scott B	15000-045	372.50	$0.00913	0.43	0.46
6/1/2002	Dougherty 4-A	15000-008	0.00	$0.00913	0.00	0.00
6/1/2002	Mustang B	15000-035	349.03	$0.00913	0.40	0.43
6/1/2002	Smith	15000-048	0.00	$0.00913	0.00	0.00
6/1/2002	Lentz B	15000-027	181.71	$0.00913	0.21	0.22
6/1/2002	White II	15000-056	22.71	$0.00913	0.03	0.03
6/1/2002	Buckles	15000-005	175.65	$0.00913	0.20	0.22
6/1/2002	Jensen	15000-017	80.25	$0.00913	0.09	0.10
6/1/2002	Smith A/Sycamore Springs	15000-047	77.98	$0.00913	0.09	0.10
6/1/2002	Worl	15000-060	25.74	$0.00913	0.03	0.03
6/1/2002	New Master	15000-037	0.00	$0.00913	0.00	0.00
6/1/2002	B.N. Lee	15000-029	0.00	$0.00913	0.00	0.00
6/1/2002	C. Smith	15000-049	0.00	$0.00913	0.00	0.00

11/1/2012	Bright Futures/Johnson 3rd Party	z090200.0054.000	905.36	$0.01290	1.46	0.06
11/1/2012	Fidelity/Janzen 3rd Party	z090200.0055.000	0.00	$0.01290	0.00	0.00
11/1/2012	Fidelity/Patterson 3rd Party	z090200.0056.000	0.00	$0.01290	0.00	0.00
11/1/2012	Searchers/Ward Family Trust 34 3rd Pa	z090200.0057.000	0.00	$0.01290	0.00	0.00
11/1/2012	CEP/Sec 29 3rd Party	z090200.0058.000	15,288.01	$0.01290	24.65	1.03
11/1/2012	CEP/Sec 3 3rd Party	z090200.0059.000	5,820.73	$0.01290	9.39	0.39
11/1/2012	CEP/Sec 26 3rd Party	z090200.0060.000	2,172.32	$0.01290	3.50	0.15
11/1/2012	CEP Sec 31 3rd Party	z090200.0061.000	3,389.07	$0.01290	5.46	0.23
11/1/2012	Bright Futures/Scott 3rd Party	z090200.0062.000	2,145.36	$0.01290	3.46	0.14
11/1/2012	PostRock/Schwatken 3rd paty	z090200.0065.000	1,319.01	$0.01290	2.13	0.09
11/1/2012	Jako/Wells 3rd Party	z090200.0081.000	905.36	$0.01290	1.46	0.06
11/1/2012	Jako/Tate 3rd Party	z090200.0082.000	426.66	$0.01290	0.69	0.03
11/1/2012	Jako/Puckett 3rd Party	z090200.0083.000	0.00	$0.01290	0.00	0.00
11/1/2012	Vaughn/Vaughn 1 3rd Party	z090200.0086.000	1,108.00	$0.01290	1.79	0.07
11/1/2012	ADR Oper/Bridwell 3rd Party	z090200.0088.000	191.48	$0.01290	0.31	0.01
11/1/2012	ADR Oper/Greer 3rd Party	z090200.0092.000	0.00	$0.01290	0.00	0.00
11/1/2012	ADR Oper/Yakshaw Trust 5 3rd Party	z090200.0094.000	326.27	$0.01290	0.53	0.02
11/1/2012	ADR Oper/Yakshaw 2 3rd Party	z090200.0095.000	244.47	$0.01290	0.39	0.02
11/1/2012	PostRock/Loether 3rd Party	z090200.0097.000	0.00	$0.01290	0.00	0.00
11/1/2012	PostRock/Schwatken 11-1 3rd Party	z090200.0098.000	366.24	$0.01290	0.59	0.02
11/1/2012	PostRock/Schwatken 12-1 3rd Party	z090200.0099.000	607.91	$0.01290	0.98	0.04
11/1/2012	PostRock/Schwatken 14-1 3rd Party	z090200.0100.000	1,455.65	$0.01290	2.35	0.10
11/1/2012	Cunningham Energy 3rd Party	z090200.0101.000	0.00	$0.01290	0.00	0.00
11/1/2012	Cunningham Crude 3rd Party	z090200.0102.000	40.90	$0.01290	0.07	0.00
			65,348,082.00		$97,816.33	$42,354.30

Prod Date	Lease Name	Lease Number	Metron Prod Gas Volume Summaries (MMBTU)	Gas Sales Volume Allocations (MMBTU)	LF&U (measured volume minus allocated volume)	Southern Star Index Price	RD Value of LF&U (12.5%)	Interest at 10% Simple thru 4-1-13
6/1/2002	Horner E	15000-014	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Lavley C	15000-021	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Lavley D	15000-023	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Lentz	15000-027	202.00	152.94	49.06	3.08	18.89	20.46
6/1/2002	Wise	15000-058	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Gutschenritter	15000-013	1,010.00	764.68	245.32	3.08	94.45	102.32
6/1/2002	Mustain	15000-034	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Mahaffey	15000-031	310.00	234.70	75.30	3.08	28.99	31.40
6/1/2002	Bollinger Oil	3rd Party	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Perkins	15000-039	407.00	308.14	98.86	3.08	38.06	41.23
6/1/2002	Howard	15000-015	41.00	31.04	9.96	3.08	3.83	4.15
6/1/2002	Thompson	15000-051	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Gordon	15000-012	175.00	132.49	42.51	3.08	16.36	17.73
6/1/2002	Ferris	15000-011	146.00	110.54	35.46	3.08	13.65	14.79
6/1/2002	J. Scott	15000-042	297.00	224.86	72.14	3.08	27.77	30.09
6/1/2002	Turner	15000-052	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Adee	15000-001	62.00	46.94	15.06	3.08	5.80	6.28
6/1/2002	Steinberger 33-10	15000-050	11.00	8.33	2.67	3.08	1.03	1.11
6/1/2002	Burck	15000-006	635.00	480.76	154.24	3.08	59.38	64.33
6/1/2002	White	15000-056	53.00	40.13	12.87	3.08	4.96	5.37
6/1/2002	Lee Wright	15000-025	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Betts	15000-004	416.00	314.96	101.04	3.08	38.90	42.14
6/1/2002	Dougherty 9-B	15000-010	2,155.00	1,631.57	523.43	3.08	201.52	218.31
6/1/2002	Oakhurst Farms	15000-038	98.00	74.20	23.80	3.08	9.16	9.93
6/1/2002	McDaniels	15000-032	74.00	56.03	17.97	3.08	6.92	7.50
6/1/2002	Howard B	15000-016	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Donna Lee	3rd Party	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Pierce 1	15000-041	101.00	76.47	24.53	3.08	9.44	10.23
6/1/2002	Leady	15000-024	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Scott A	15000-044	738.00	558.75	179.25	3.08	69.01	74.76
6/1/2002	Scott B	15000-045	492.00	372.50	119.50	3.08	46.01	49.84
6/1/2002	Dougherty 4-A	15000-008	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Mustang B	15000-035	461.00	349.03	111.97	3.08	43.11	46.70
6/1/2002	Smith	15000-048	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Lentz B	15000-027	240.00	181.71	58.29	3.08	22.44	24.31
6/1/2002	White B	15000-056	80.00	22.71	7.29	3.08	2.81	3.04
6/1/2002	Buckles	15000-005	232.00	175.65	56.35	3.08	21.69	23.50
6/1/2002	Jensen	15000-017	106.00	80.25	25.75	3.08	9.91	10.74
6/1/2002	Smith A/Sycamore Springs	15000-047	103.00	77.98	25.02	3.08	9.63	10.43
6/1/2002	Worl	15000-060	34.00	25.74	8.26	3.08	3.18	3.44
6/1/2002	New Marker	15000-037	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	B.W. Lies	15000-029	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	C. Smith	15000-049	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	B. McDaniels	15000-033	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Keller Trust	15000-020	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Bennett	15000-003	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Don Jones	3rd Party	0.00	0.00	0.00	3.08	0.00	0.00
6/1/2002	Fred Smith	15000-057	11,468.00	8,682.53	2,785.47	3.08	1,072.40	1,161.77
6/1/2002	Watson	15000-053	65.00	49.21	15.79	3.08	6.08	6.58
6/1/2002	Scott Rock	3rd Party	0.00	0.00	0.00	3.08	0.00	0.00

11/1/2012 CEP Sec 31 3rd Party	x090200.0061.000	3,646.00	3,389.07	256.93	3.26	104.70	4.16
11/1/2012 Bright Futures/Scott 3rd Party	x090200.0062.000	2,308.00	2,145.36	162.64	3.26	66.28	2.76
11/1/2012 PostRock/Schwatken 3rd paty	x090200.0065.000	1,419.00	1,319.01	99.99	3.26	40.75	1.70
11/1/2012 Jako/Wells 3rd Party	x090200.0091.000	974.00	905.36	68.64	3.26	27.97	1.17
11/1/2012 Jako/Tate 3rd Party	x090200.0092.000	458.00	426.66	32.34	3.26	13.18	0.55
11/1/2012 Jako/Puckett 3rd Party	x090200.0093.000	0.00	0.00	0.00	3.26	0.00	0.00
11/1/2012 Vaughn/Vaughn 1 3rd Party	x090200.0096.000	1,192.00	1,108.00	84.00	3.26	34.23	1.43
11/1/2012 ADR Oper/Bridwell 3rd Party	x090200.0088.000	206.00	191.48	14.52	3.26	5.92	0.25
11/1/2012 ADR Oper/Ebner 3rd Party	x090200.0092.000	0.00	0.00	0.00	3.26	0.00	0.00
11/1/2012 ADR Oper/Yekshaw Trust 5 3rd Party	x090200.0084.000	351.00	326.27	24.73	3.26	10.08	0.42
11/1/2012 ADR Oper/Yekshaw 2 3rd Party	x090200.0085.000	268.00	244.47	18.53	3.26	7.55	0.31
11/1/2012 PostRock/Loether 3rd Party	x090200.0087.000	0.00	0.00	0.00	3.26	0.00	0.00
11/1/2012 PostRock/Schwatken 11-1 3rd Party	x090200.0098.000	394.00	366.24	27.76	3.26	11.31	0.47
11/1/2012 PostRock/Schwatken 12-1 3rd Party	x090200.0099.000	654.00	607.91	46.09	3.26	18.78	0.78
11/1/2012 PostRock/Schwatken 14-1 3rd Party	x090200.0100.000	1,566.00	1,455.65	110.35	3.26	44.97	1.87
11/1/2012 Cunningham Energy 3rd Party	x090200.0101.000	0.00	0.00	0.00	3.26	0.00	0.00
11/1/2012 Cunningham Crude 3rd Party	x090200.0102.000	44.00	40.90	3.10	3.26	1.26	0.05
		71,101,184.88	65,348,082.00	5,753,102.88		52,703,674.13	51,942,726.45

Ex. E to Decl.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 05/13/13]

Case No. 12-CV-04157

BRANDON W. OWENS, individually
and on behalf of all others
similarly situated,

Plaintiffs,

v.

DART CHEROKEE BASIN OPERATING CO. LLC,
AND CHEROKEE BASIN PIPELINE, LLC,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF REMAND TO STATE COURT

Defendants' Notice of Removal submitted no evidence to prove its assertion that $5 million or more was in controversy, a prerequisite to federal subject matter jurisdiction under 28 U.S.C. § 1332(d). Acknowledging this fatal deficiency, Dart[1] attempts to cure it by filing, with its response to plaintiff's motion to remand (Dkt. 23), the Declaration of Charles E. Henderson ("Henderson Decl.", Dkt, 23-1). Dart euphemistically characterizes the Henderson Declaration as "additional support" for its removal

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[1] "Dart" refers to both defendants Dart Cherokee Basin Operating Co., LLC, and Cherokee Basin Pipeline, LLC.

(Dkt. 23 at 2-3) when the Declaration is the *only* evidence submitted in support. But, as this Court has found, Tenth Circuit law is clear that such belated attempts to bolster a deficient notice of removal are insufficient. *See* Pl. Mem., Dkt. 13 at 6.

1. Tenth Circuit law requires remand.

Dart cites not one case that permits late submission of evidence to cure a deficient Notice of Removal filed five months earlier. *See* Dkt. 23 (filed May 1, 2013) and Dkt. 1 (filed Dec. 5, 2012). This is because Tenth Circuit authority prohibits consideration of "factual allegations or evidence outside of the petition and notice of removal" to "determine the amount in controversy." *Benefits Technologies, LLC v. Stanley*, 10-CV05610-CVE, 2010 WL 4736297 (N.D. Okla. Nov. 16, 2010) (citing *McPhail v. Deere Co.*, 529 F.3d 947, 953 (10th Cir. 2008)[2]; *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 Fed. Appx. 775 (10th Cir. Sept. 8, 2005); *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995); and *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001)). Dart's attempt to dismiss this authority as "an unpublished district court opinion" from Oklahoma, Dkt. 23 at 8, disregards

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[2] Dart quotes the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") which codified the holding in *McPhail* that jurisdictional facts must be proven by a preponderance of the evidence. Dkt. 23 at 5. The JVCA specifies that "the notice of removal may assert the amount in controversy" and says removal is proper "if the district court finds, by preponderance of the evidence, that the amount in controversy exceeds" the jurisdictional minimum. The JVCA does not say that post-removal evidence can be considered in determining whether the removing party met its burden to prove jurisdictional facts at the time of removal.

the controlling Tenth Circuit authority on which the opinion relies.

Add to this body of Tenth Circuit law the recently decided *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242 (10th Cir. 2012), which Dart cites at Dkt. 23 at 4-5, and which further supports remand in this case.

> In analyzing the propriety of removal, we have held that "[t]he burden is on the party requesting removal to set forth, *in the notice of removal itself* the underlying facts supporting [the] assertion that the amount in controversy exceeds [the jurisdictional minimum]." *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir.1995) (quotation omitted).

Frederick, 683 F.3d at 1245 (emphasis added). In *Frederick,* the Tenth Circuit "squarely" held that the removing party "must show by a preponderance of the evidence that the amount in controversy exceeds the amount in § 1332(d)—currently $5,000,000." *Id.* at 1244. Where "plaintiff requests undefined damages or damages below the jurisdictional minimum", "the defendant must 'prove...jurisdictional facts by a preponderance of the evidence' to remain in federal court." *Id.* at 1245-46. In *Frederick,* the removing party Hartford attempted to satisfy its burden by submitting *with the notice of removal itself* the affidavit of a Hartford employee who calculated the amount in controversy to be over $5,000,000. *Id.* at 1245. The Tenth Circuit reversed the order granting remand because the district court treated Frederick's complaint for $4,999,999.99 as dispositive without evaluating Hartford's "notice of removal or the evidence submitted supporting jurisdiction." *Id.* at 1248. It remanded the case for reevaluation of the

Hartford affidavit in light of *Frederick*. Here, unlike Hartford, Dart submitted no evidence to prove jurisdictional facts with its Notice of Removal. Under *Frederick*, the most recent Tenth Circuit authority and the body of Tenth Circuit law on which it is premised, Dart failed to meet its burden to establish jurisdictional facts; and the case must be remanded for lack of jurisdiction.

2. Neither the petition nor the notice of removal prove jurisdiction.

To avoid remand, Dart claims the Court can piece together from allegations in the petition and in its Notice of Removal that more than $5 million was in controversy at the time of removal. Dkt. 23 at 2 (identifying the class period, the number of wells, allegations about the underpayment of royalties, and its conclusion that more than $5 million was in controversy). But the only documents filed with Dart's Notice of Removal were copies of the summonses and class action petitions served on each of the respective defendants and the 14 Day Clerk's Order extending Dart's time in which to answer or otherwise plead. Dkts. 1, 1-1, 1-2 & 1-3. From these documents, Dart asks the Court to presume the truthfulness of its assertion in the Notice of Removal that "the amount of additional royalty sought is in excess of $8.2 million", Dkt. 1, ¶15 (no citation to evidence). But, as *Frederick* held, the removing party must prove jurisdictional facts where, as here, the petition is silent as to the amount in controversy. Dkt. 13 at 2, ¶ 4; Dkt. 23 at 5 ("In the instant case, the Petition filed in state court contained no allegation as to the amount in controversy or any claim as to the amount of damages being claimed."). The record shows Dart offered no evidence of underlying facts with the Notice of

Removal to support its assertion that more than $5 million was in controversy. Dart cannot meet an evidentiary burden when it provided no evidence in the Notice of Removal itself.

This Court so found in *Coca-Cola Bottling of Emporia, Inc. v. South Beach Bev. Co.*, 198 F.Supp.2d 1280, 1285-86 (D. Kan. 2002). Despite the block quotation from *Coca-Cola Bottling* in Plaintiffs motion to remand, Dkt. 13 at 4, Dart completely ignores the case in its response. Dkt. 23. This is because *Coca-Cola Bottling,* decided by Your Honor, disposes of the issue of whether Dart's belated declaration can remedy its fatally deficient Notice of Removal. "[A]s the Tenth Circuit noted in *Laughlin v. Kmart Corp.*, because jurisdiction is determined at the time of the notice of removal, *the movant must meet its burden in the notice of removal, not in some later pleading.*" *Coca-Cola Bottling,* 198 F.Supp.2d at 1283 (declining to consider an affidavit submitted with the response to the motion to remand) (emphasis added).

The Tenth Circuit cited *Coca-Cola Bottling* in *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 Fed. Appx. 775 (10th Cir. 2005) which reviewed the district court's award of attorneys' fees for wrongful removal under 28 U.S.C. § 1447(c). In affirming the fee award, the Tenth Circuit found no error in the district court's refusal to consider an "after-the-fact affidavit" or post-removal discussions about a stipulation as to the amount in controversy as "irrelevant".

> Neither Farm Bureau's petition nor JSSJ's notice of removal establishes the requisite jurisdictional amount in this case. As noted above, the petition complies with Oklahoma pleading requirements and, by requesting damages in excess of $10,000

> plus attorney fees, simply recites the necessary amount in controversy to invoke state district court jurisdiction. *See* Okla. Stat. tit. 12 § 2008 (A)(2). JSSJ's notice of removal states only that federal subject matter jurisdiction is available because Farm Bureau is seeking relief under MMWA and Farm Bureau's claim seeks "more than $1,000,000 in relief." Aplt.App. at 4. Neither of these two statements establish the assertion that the amount in controversy of the MMWA claim exceeds $50,000. [Footnote omitted] Because the allegations in the petition are not diapositive, it was up to JSSJ, "in the notice of removal itself, [to set forth] the *underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000." *Laughlin,* 50 F.3d at 873 (quotation omitted). This they failed to do. *Any additional matters in the record, including Mr. Capron's after-the-fact affidavit, Aplt.App. at 79-80, and Farm Bureau's attempt to formally stipulate to a $50,000 amount in controversy in its brief in support of its motion to remand, id. at 16, are inadequate to cure these deficiencies. See Martin v. Franklin Capital Corp.,* 251 F.3d 1284, 1291 n. 4 (10th Cir.2001) *(Martin I).*

Oklahoma Farm Bureau, 149 Fed. Appx. at 778 (emphasis added). Like JSSJ's notice of removal in *Oklahoma Farm Bureau* that asserted Farm Bureau's claim seeks "more than $1,000,000 in relief, Dart's Notice of Removal asserts that "the amount of additional royalty sought is in excess of $8.2 million" Dkt. 1, ¶ 15. No underlying facts are provided. Like JSSJ's notice of removal, this bare allegation is insufficient to prove the jurisdictional fact of the amount in controversy. Like JSSJ, Dart failed to meet its burden to prove this Court's jurisdiction on

December 5, 2012, when the Notice of Removal was filed; and the Henderson Declaration filed five months later on May 1, 2013, cannot change that. Nor can the post-removal settlement calculations or Plaintiff's Counsel's other royalty class action settlements be used to cure Dart's deficient Notice of Removal. This case should be remanded.

Realizing its predicament, Dart makes two arguments: I) Plaintiff does not now contest that the amount in controversy is more than $5 million; and 2) Plaintiff now knows the amount in controversy is more than $5 million so the Court should excuse Dart's evidentiary failure and find jurisdiction anyway. Both arguments are easily disposed of.

3. Dart, not Plaintiff, bears the burden to prove jurisdictional facts.

Dart strains to shift the burden to Plaintiff to contest the amount in controversy. Dkt. 23 at 2 (Plaintiff's motion to remand does not state he is seeking less than the jurisdictional amount), 8 (since filing of remand, parties have had time to more fully evaluate the amount in controversy), 13-14 (Plaintiff's counsel knows how to plead his claim to prevent removal). But, as shown above, the Tenth Circuit law places the burden to prove jurisdictional facts on the removing party. Dkt. 13 at 2-3, 13-14. Here, Dart, not Plaintiff, has the burden to show by a preponderance of the evidence the case involves more than $5 million in controversy. Its Notice of Removal did not do this which is why Dart belatedly filed the Henderson Declaration to try to avoid remand. But as in *Coca-Cola Bottling* and in *Oklahoma Farm Bureau,* "after-the-fact" developments are irrelevant because jurisdiction is determined at the time of removal.

4. Jurisdiction is determined at the time of removal so post-removal evidence is irrelevant.

Dart tries to excuse its deficient Notice of Removal with calculations provided in anticipation of the parties' confidential mediation session in early April 2013, long after any removal, and evidence in support, was due. Dkt. 23 at 3. Setting aside whether calculations provided as part of confidential settlement negotiations are admissible, Dkt. 23-1, ¶¶ 9, 10, Dart cannot use the mediation to belatedly develop evidence to support its assertion of the amount in controversy. It is simply too late. Defendant filed its Notice of Removal on December 5, 2012. Dkt. 1. Plaintiff filed its motion to remand on December 19, 2012, stating Dart failed to support its Notice of Removal with evidence of the amount in controversy. Thereafter, the parties agreed to mediation and moved to stay the case. Dkt. 14 (Dec. 21, 2012). The Court ordered the case stayed. Dkt. 16 (Jan. 16, 2013) (staying all pretrial proceedings including discovery). Dart then provided documentation to Plaintiff's counsel to permit analysis of the liability and damages issues involved. Dkt. 23-1, ¶¶ 9, 10. Thereafter, Dart used Plaintiff's calculations in its response to Plaintiff's motion to remand in trying to cure or disguise the deficiency in its Notice of Removal. Dart's response to the motion to remand was filed about one month after the April 4th mediation, on May 1, 2013. While intriguing, all of this is irrelevant because it all occurred long after Dart's removal of the case on December 5, 2012. *Coca-Cola Bottling,* 198 F.Supp.2d at 1283 ("because jurisdiction is determined at the time of the notice of removal, the movant must meet its burden in the notice of removal, not in some later pleading."); *see also, Oklahoma Farm Bureau,* 149 Fed. Appx. at 778. Dart

cannot use Plaintiffs settlement calculations created months after Dart filed its Notice of Removal to meet its burden to prove jurisdictional facts at the time of removal.

Dart cites *McPhail* and *Meridian Security Inc. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006) to justify its use of the calculations provided in anticipation of mediation to support removal. Dkt. 23 at 8. While the cases permit such use for jurisdictional purposes, the calculations or documents supporting plaintiff's proposed settlement amount still must be included with the Notice of Removal. The *McPhail* excerpt that Dart cites affirms "documents that demonstrate plaintiff's own estimation of its claim are a proper means of supporting the *allegations in the notice of removal.*" Dkt. 23 at 9 citing *McPhail,* 529 F.3d at 956 (notice of removal incorporated emails and letters showing plaintiff attorney's valuation of the claim) (italics added). In *Meridian,* the Seventh Circuit merely suggests "plaintiff's informal estimates or settlement demands" as one way in which a defendant might satisfy its burden to prove jurisdictional facts. *Meridian,* 441 F.3d at 542. Nothing in either *McPhail* or *Meridian* supports the filing of a declaration five months after the filing of the notice of removal to provide, for the first time, evidence of the underlying facts supporting the removing party's calculation of the amount in controversy. In fact *Coca-Cola Bottling* and *Oklahoma Farm Bureau* hold to the contrary. *See* p. 4, *supra.* Nor does *McPhail* or *Meridian* require an evidentiary hearing under Rule 12(b)(1), as Dart suggests, to provide the removing party *another* opportunity to provide evidence it already had but did not submit with the Notice of Removal.

5. Dart cannot cure its legally deficient Notice of Removal with post-removal evidence about the amount in controversy.

Indeed, the Henderson Declaration shows Dart had the information at the time of the Notice of Removal but failed to offer it to prove the jurisdictional fact of the amount in controversy. Dkt. 23-1 at 1, ¶2, ¶4 ("initially identified over 700 wells"), ¶5 (gas from all 700 wells paid under same arrangement, royalties calculated the same way, class-wide damages can be proven), ¶6 (class-wide damages can be proven for shrinkage), ¶7 (Dart had actual production and sales data at the time of the notice of removal and ran a "formal economic analysis of potential damages"), ¶8 (accounting for statute of limitations affirmative defense done at time of removal to arrive at $8.2 million figure used in the Notice of Removal). So, although Dart suggests, by its citation to *McPhail,* that it had difficulty determining the amount in controversy because plaintiff did not specify the amount in his petition, that is just not so in this case as the Henderson Declaration demonstrates. Dkt. 23 at 8 (defendant faces difficulty when petition contains no statement of the amount in controversy), 14 (Dart had to determine damages Plaintiff was seeking to recover). Dart had the underlying facts but failed to submit evidence of them with its Notice of Removal; it cannot cure that deficiency now.

Taking a somewhat inconsistent tack, Dart suggests its belated filing of the Henderson Declaration results from the parties' further evaluation information and data it provided after removal and before the mediation. Dkt. 23 at 8. But again, "because jurisdiction is determined at the time of the notice of removal, *the movant must meet its burden in the notice of removal,*

not in some later pleading." Coca-Cola Bottling, 198 F.Supp.2d at 1283. So this post-removal conduct is irrelevant to Plaintiff's motion to remand.

Also irrelevant is Dart's use of Plaintiff counsel's settlements in other royalty underpayment class actions, *see* Dkt. 23 at 7.[3] These settlements are irrelevant to the question of whether Dart's unsupported statement that "$8.2 million" was in controversy in its Notice of Removal satisfied its burden to prove by a preponderance of evidence the amount in controversy. Under the case law cited above, it does not.

Similarly, Dart's recitation of the procedural history in *Eatinger v. BP America Production Company* at 11-13 is irrelevant. Remand in BP was denied because BP's calculation of damages appeared in its Notice of Removal. Dkt. 23 at 11. BP complied with the law by submitting evidence to prove the amount in controversy. BP did not rest solely on the allegations in the petition or one sentence in its Notice of Removal without citation to evidence. It proved the jurisdictional fact so that case stayed in

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[3] Plaintiff's counsel has also settled royalty underpayment cases in state court for less than the federal jurisdictional amount in controversy. *See Freebird, Inc. v. Cimarex Energy Corp.*, 264 P.3d 500, 503 (Kan.App. Oct. 7, 2011) *rev. denied* (Kan. June 13, 2012) ($3.45 million settlement). So Dart's suggestion that all royalty underpayment class actions satisfy the amount in controversy based on the class period, number of wells, and royalty underpayment allegations is inaccurate. Dkt. 23 at 7, 10.

Interestingly, Judge Belot, relying in part on *Coca-Cola Bottling,* remanded *Freebird* to state court because Cimarex failed to prove the amount in controversy. The affidavit Cimarex filed with its notice of removal failed to support the amount in controversy assertion with underlying data. *Freebird, Inc. v. Cimarex Energy Co.*, 599 F.Supp.2d 1283, 1286-87 (D. Kan. 2008).

federal court. Dart failed to prove the jurisdictional fact of the amount in controversy with evidence in its Notice of Removal. This case must be remanded to state court.

CONCLUSION

Dart asks this Court to disregard the Tenth Circuit authority requiring jurisdictional facts be proven in Notice of Removal itself, to consider its belated submission of the Henderson Declaration, and to excuse its deficient Notice of Removal because Plaintiff knows or does not contest this case puts more than $5 million in controversy. But none of these excuses satisfy the clear legal standard — the removing party must prove jurisdictional facts in its Notice of Removal, not a subsequent pleading. Dart's Notice of Removal fails to prove the requisite amount in controversy by a preponderance of the evidence. This Court lacks subject matter jurisdiction. The case must be remanded to state court. Plaintiff's motion to remand (Dkt. 12) should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to all counsel who have registered for receipt of the documents filed in this matter.

/s/ Rex A. Sharp

OPPOSITION BRIEF

No. 13-719

In The
Supreme Court of the United States

DART CHEROKEE BASIN
OPERATING COMPANY, LLC,
and CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS,
On behalf of himself and all others similarly situated,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Because federal district courts are courts of limited jurisdiction, the party asserting federal jurisdiction carries the burden to prove original federal subject matter jurisdiction exists. This legal tenant holds particularly true where a party removes the action from the plaintiff's chosen state court forum. Recognizing that removal statutes are to be strictly construed and that the party asserting jurisdiction carries the burden of proof, was the district court correct in requiring Petitioners – which admittedly possessed all of the evidence to prove the amount in controversy at the time of removal – to present at least some evidence that the statutorily specified amount in controversy was met with its notice of removal, or could Petitioners invoke the federal court machinery (pleadings, scheduling, affirmative disclosures, protective orders, and discovery) with a naked assertion that the amount in controversy was satisfied and wait until months later, after Respondent Owens had filed his motion to remand, to file the evidence supporting the calculation of the amount in controversy necessary for the district court's subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Brandon Owens is an individual and makes no corporate disclosure statement. He has no parent corporation and does not issue stock such that a public company could own 10% or more of it.

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INTRODUCTION

Dart removed Owens' class action petition alleging in its notice of removal that the federal district court had diversity jurisdiction under 28 U.S.C. §1332(d).[1] But Dart filed no evidence to support the allegations; and the district court concluded: "The jurisdictional facts alleged in the Petition and Notice of Removal do not show by a preponderance of the evidence that the amount in controversy exceeds $5 million. Guided by the strong presumption against removal, this case is remanded to state court for lack of subject matter jurisdiction." Pet. App. 28a. The Tenth Circuit denied Dart's petition for permission to appeal the remand order and denied Dart's petition for rehearing en banc. Pet. App. 1a, 13a. Dart seeks a writ of *certiorari* to rescue them from their failure of proof and to rewrite centuries of law requiring some evidence of jurisdictional facts.

Federal District Courts Have Limited Jurisdiction.

Federal district courts are courts of "limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Congress conferred on the federal district courts two types of original jurisdiction: 1) federal question

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[1] "Dart" refers to both Petitioners Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline, LLC.

jurisdiction under 28 U.S.C. §1331; and 2) diversity jurisdiction under 28 U.S.C. §1332. *Id.* "To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, §1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently $75,000." *Id.* And, in minimally diverse class actions having more than 100 members, §1332(d)(2) requires that specified amount exceed $5 million.

Congress enacted §1332(d) "to amend the procedures that apply to consideration of interstate class actions" and to place class actions of "national importance" in federal court. *Mississippi ex rel. Hood v. AU Optronics Corp.*, ___ U.S. ___, 134 S.Ct. 736, 739 (Jan. 14, 2014). But this class action is not of "national importance"; and neither Dart nor the Chamber attempt to argue that it is.[2] This putative class action is of local importance, involving approximately 400 royalty owners claiming underpayment of royalty for gas produced from approximately 700 wells, all of which are located in Kansas. Pet. App. 29a, 31a, 39a. Contrary to Dart's and the Chamber's view, this class action is not an "interstate class action" of "national importance" of the type that Congress intended to be in federal district court. And, once discovery is

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[2] "Chamber" refers to the Chamber of Commerce of the United States of America which has filed a motion for leave to file a brief as *amicus curiae* in support of Dart. The Chamber's brief is virtually identical to Dart's Petition; and, this opposition addresses the arguments in both.

allowed, the local controversy or home state exceptions to federal jurisdiction are likely to apply because more than two-thirds or at least one-third of the royalty owners will be Kansas citizens. 28 U.S.C. §1332(d)(3) & (d)(4).

The Class Action Fairness Act of 2005 ("CAFA") amended the federal court's diversity jurisdiction over class actions in §1332. As Dart recognized in its petition for rehearing en banc, the amendments changed the substantive, but not procedural, requirements for removal. *Dart Cherokee Basin Operating Co., LLC, v. Owens*, No. 13-603 (10th Cir. July 5, 2013) (ECF Doc. #01019085396). Nonetheless Dart (and the Chamber) attempts to distract this Court with CAFA when the Petition presents no question involving CAFA. *See* Pet., p. (i) quoting 28 U.S.C. §1446(a), not 28 U.S.C. §1332(d) (CAFA); *cf.* Chamber Mot. ii (focused on CAFA).

Dart's petition presents a question about the "procedure for removal of civil actions" as codified at 28 U.S.C. §1446, which applies to class actions under §1453(b).[3] No one contests that §1446(a) requires the

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[3] Section 1453(b) provides: "A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants." Hence, all provisions of §1446 apply to class actions except 1446(c)(1). This means §1446(c)(2) applies to defendants removing class actions as well.

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defendant to file a notice of removal "containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon" it. But Dart ignores that the same statute also sets forth requirements for removal based on diversity of citizenship jurisdiction under §1332. 28 U.S.C. §1446(c). Those requirements include: (a) accepting the amount in controversy alleged in the initial pleading filed in state court; or, (b) if that pleading seeks non-monetary relief or an unspecified money judgment (as the petition here did because Owens, an individual royalty owner, could not know class size, i.e., the number of royalty owners, or the amount in controversy, i.e., the amount of royalty Dart has underpaid over the years at the pleading stage and without discovery) the amount stated in the notice of removal **and** "the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." §1446(c)(2)(A) & (B) (emphasis on "and" added).

Rather than sweeping removal of all class actions into federal court under CAFA as Dart and the Chamber would like to do, "[the] statutory procedures for removal are to be strictly construed." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (noting that the policy underlying

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See Chamber Br. 7, n.2 (no reason to demand more from CAFA defendant and no reason to demand less either.)

removal statutes "is one calling for the strict construction of such legislation")); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined"); *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922). Though certainly aware of this long-standing law, Congress did not change it in enacting CAFA. *Hall v. United States*, 566 U.S. ___, 132 S.Ct. 1882, 1889 (2012). Nor did Congress relieve class action defendants from the statutory requirements for diversity jurisdiction and say all class actions belong in federal court.[4] In CAFA, Congress gave class action defendants a tool, not a free pass, for removing class actions into federal court. Compliant use of the tool is necessary to make removal stick.

The Party Asserting Federal Jurisdiction Has the Burden to Prove It with Some Evidence and Cannot Merely Allege It.

The requirements that the notice of removal state the amount in controversy where the petition

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[4] As authority for this proposition, the Chamber cites a case that was decided eleven years before CAFA's enactment. Clearly, the case cannot support "an expansive interpretation" of CAFA's removal provisions. Chamber Br. 15, n.4 (citing *Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994)).

does not *and* attach evidence from which the district court can find, by preponderance of the evidence, that the amount in controversy exceeds the jurisdictional minimum ensures that the defendant, who, in class actions, is often the party with the evidence of the amount in controversy, presents that evidence at the earliest opportunity. This permits the plaintiff and the district court to evaluate that evidence to determine whether plaintiff has a basis for a motion to remand that must be filed within thirty (30) days of the notice of removal under 28 U.S.C. §1447(c) and whether that evidence supports a finding that the jurisdictional amount is met. This procedure aligns with more than two centuries of this Court's precedent (dating back to 1799) holding that the party asserting federal jurisdiction must provide evidence of it in the court record. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986) ("[The] court [must] deny its own jurisdiction . in all cases where such jurisdiction does not affirmatively appear in the record[.]"); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) ("The [removal] jurisdiction of the [federal] court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record."); *Jackson v. Ashton*, 33 U.S. 148 (1834) (Marshall, C.J.) ("The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case."); *Capron v. Van Noorden*, 2 Cranch 126, 2 L.Ed. 229 (1804) ("The Courts of the U.S. have not jurisdiction unless the record shews [sic] that the parties are citizens of different states, or

that one is an alien, & c."); *Turner v. Bank of N.A.*, 4 Dall. 8, 1 L.Ed. 718 (1799) ("[I]t [is] necessary to set forth upon the record the facts or circumstances which give jurisdiction[.]").

To ensure an early determination and the proper exercise of the federal district courts' limited jurisdiction, the Tenth Circuit has long required that the removing defendant present some evidence to support the underlying jurisdictional facts with the notice of removal. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F.Appx. 775 (10th Cir. 2005); *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008); *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1246 (10th Cir. 2012). And, contrary to the Chamber's cry, counsel representing defendants who remove cases from state to federal court have followed this law by filing evidence with the notice of removal without complaints of undue burden or difficulty for years.[5] Even Dart's

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[5] Owens' counsel filed the listed actions in state court. All of them were removed to federal court and attached a declaration to support the amount in controversy. Indeed, many of the removal notices cite *Laughlin* and *McPhail* as requiring evidence of the facts giving rise to the federal district court's jurisdiction to be filed with the notice of removal. *Eatinger v. BP Am. Prod. Co.*, No. 07-1266-JTM (D. Kan. Sept. 7, 2007) (Notice of Removal ("NOR"), doc. #1 and declarations in support, doc. ##1-5, 1-6); *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM (D. Kan. Sept. 26, 2007) (NOR, doc. #1 and declaration on amount in controversy in support, doc. #1-4); *Freebird, Inc. v.*

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former counsel at the time of removal in this case, Morris Laing, filed a declaration with its notice of removal to provide evidence of the amount in controversy in *Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.*, No. 09-1394-CM (D. Kan. Dec. 11, 2009) (notice of removal, doc. #1 and declaration in support, doc. #1-4). The *Arkalon* notice of removal was filed almost three years before the one in this case. *Compare* Doc. #1 in *Arkalon* (filed Dec. 11, 2009) *with* Pet. App. 42a (Dec. 5, 2012). So Dart's counsel knew or should have known the Tenth Circuit Rule and simply failed to follow it in this case. And, as a Hail Mary pass, Dart's new counsel hopes this Court will

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Merit Energy Co., No. 08-1305-WEB (D. Kan. Oct. 14, 2008) (NOR, doc. #1 and affidavit in support, doc. #1-3); *Wallace B. Roderick Rev. Living Trust v. XTO Energy, Inc.*, No. 08-CV-01330-JTM (D. Kan. Oct. 24, 2008) (NOR, doc. #1 and plaintiff's demands for more than $5 million, doc. ##1-7, 1-8, 1-9); *Freebird, Inc. v. Merit Energy Co.*, No. 10-1154-KHV (D. Kan. May 18, 2010) (NOR, doc. #1 and affidavit in support, doc. #1-2); *Hitch Enterprises, Inc. v. Cimarex Energy Co.*, No. CIV-11-13-W (W.D. Okla. Jan. 6, 2011) (NOR, doc. #1 and declaration in support, doc. #1-5); *Carlile v. Murfin, Inc.*, No. 11-CV-1186-JWL (D. Kan. July 15, 2011) (NOR, doc. #1 with declaration in support attached as Exhibit B to doc. #1); *Wallace B. Roderick Rev. Living Trust v. OXY USA, Inc.*, No. 12-CV-1215-RDR (D. Kan. June 14, 2012) (NOR, doc. #1 and expert report establishing plaintiff demanded more than $5 million, doc. #1-7); *Dreitz v. Linn Operating, Inc., et al.*, No. 13-1179-EFM (D. Kan. May 9, 2013) (NOR, doc. #1 and affidavits in support, doc. ##1-5 and 1-6); *Hitch Enterprises, Inc. v. OXY USA, Inc.*, No. CIV-13-543-M (D. Kan. May 28, 2013) (NOR, doc. #1 and affidavit in support, doc. #1-3); *Catron v. Colt Energy, Inc., et al.*, No. 13-4073-CM (D. Kan. July 3, 2013) (NOR, doc. #1 and affidavit in support, doc. #1-1).

rescue Dart from the Kansas state court for this Kansas class action.[6]

Providing evidence of the amount in controversy with the notice of removal also comports with Rule 1 of the Federal Rules of Civil Procedure which urge construction "to secure the just, speedy, and inexpensive determination of every action and proceeding." With only an allegation about the amount in controversy in the notice of removal, plaintiff has no evidence as to how defendant calculated the amount such that he can challenge it. And because removal occurs before the Fed. R. Civ. P. 26(f) conference and discovery, plaintiff cannot obtain discovery before having to file the motion to remand. So the Chamber's assertions of "gamesmanship" by plaintiff when plaintiff has no evidence is folly. Chamber Br. 16. Nor can the district court make a finding, under any evidentiary standard, on a "naked assertion" of the amount in controversy to ensure the statutory prerequisites for jurisdiction under §1332 are met and the district court can properly hear the case. *See* Pet. App. 37a.

The question Dart's petition presents is simply whether a mere allegation in a notice of removal, without any supporting evidence, that the statutorily prescribed amount in controversy is satisfied, carried

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[6] Notably, Dart was able to prepare and file a single eleven paragraph declaration in support of its response to Owen's motion to remand without any difficulty. Pet. App. 75a. It would not have been onerous for Dart to have done the same with its notice of removal.

Dart's burden to prove federal jurisdiction exists in order to divest Owens of his chosen state court forum. *See Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013) (noting plaintiff is the master of his complaint and has the right to choose his forum) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)). The Tenth Circuit and the district court concluded that a mere allegation in the notice of removal could not establish federal jurisdiction, especially where Dart had the evidence and could have presented that evidence with its notice of removal as decades of Tenth Circuit precedent requires. Indeed, the dissent to the order denying Dart's petition for rehearing en banc acknowledged that the question would not arise again because "any diligent attorney (and one can assume that an attorney representing a defendant in a case involving at least $5 million – the threshold for removal under CAFA – would have substantial incentive to be diligent) would submit to the evidentiary burden rather than take a chance on remand to state court." Pet. App. 3a; *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.2d 1234, 1235 (10th Cir. 2013). And, as noted earlier, many diligent attorneys, including Dart's former counsel, have carried the burden within the 30-day time frame for removal. *See* p. 6-7, n.5, *supra*.

Requiring Submission of Evidence with the Notice of Removal Is Sound and Administratively Simple.

The procedural rule requiring evidentiary support for the jurisdictional fact about the amount in

controversy is sound. If the removing defendant has the evidence, the defendant should present the evidence early, thereby permitting all parties and the district court the opportunity to assess it at the outset. If the defendant does not have the evidence, the defendant can seek discovery in the state court and then remove to federal court when it has the evidence, because, for class actions, there is no one (1) year limitation on removal. 28 U.S.C. §1453(b); *see* p. 3, n.3, *supra*. Or, in an individual case where the initial pleading is not removable, a defendant can remove within 30 days of an amended pleading or other paper from which federal jurisdiction can be first ascertained. 28 U.S.C. §1446(b)(3). So the 30-day time limit for removal is not nearly as ironclad as the Chamber makes it seem, and is no more onerous than the 30-day period for responding to discovery under the Federal Rules of Civil Procedure. Either way, evidence should be presented at the time of removal so the district court can make the requisite findings under §1446(c) for diversity jurisdiction.

This bright-line rule also has the virtue of simplicity. *See Mississippi ex rel. Hood*, 134 S.Ct. at 744 ("Our decision thus comports with the commonsense observation that 'when judges must decide jurisdictional matters, simplicity is a virtue.'") (citing *Standard Fire Ins. Co.*, 133 S.Ct. at 1350); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2010). Tellingly, and as Dart points out in its Petition, Judge Hartz's dissent in this case suggested Dart's notice of removal would have been adequate under *Hertz Corp.* Pet. 8;

Pet. App. 4a-7a; *see also* Chamber Br. 11. But in that case Hertz filed detailed declaration with its notice of removal to establish the amount in controversy necessary for federal court jurisdiction. *Friend v. Hertz Corp.*, No. 3:07-cv-05222-MMC (N.D. Cal. Oct. 11, 2007) (ECF Doc. #2, Decl. of Krista Memmelaar). Rather than being "novel," "wayward" or "renegade," the submission of evidence to establish jurisdictional facts alleged in the notice of removal is "proper removal practice" in the Tenth Circuit and elsewhere. *See* Chamber Br. at 4, 8, 17; *See* Section II, *infra* (demonstrating no circuit split).

As Dart recognizes, "[m]ore than 30,000 cases are removed to federal court each year." Pet. 9 (citation omitted). Yet, this issue about alleging or supporting with evidence the amount in controversy to establish the statutory prerequisites for federal jurisdiction rarely arises. *See* Chamber Br. 11. Indeed, all of the Tenth Circuit judges here either found the issue was not worth hearing or that the issue would not likely recur. Pet. App. 3a & 12a (noting that the issue in *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345 (2013), "unlike the one here, was one that would continue to arise. "). Without the likelihood of recurrence, no compelling reason exists to grant *certiorari*. Supreme Court Rule 10.

And Dart offers no compelling reason to change the well-established law. An unsupported conclusory allegation in the notice of removal that the amount in controversy is satisfied cannot substitute for evidence that Dart admittedly had at the time of removal. To

accept Dart's suggestion that providing evidence months after removal suffices to meet its burden at the time of removal would encourage sandbagging, rather than disclosing, jurisdictional evidence, would deprive plaintiff of any opportunity to timely move for remand, and would risk gearing up the federal district court machinery in cases where jurisdiction is lacking. This is not and should not be the law. Dart simply failed to present any evidence on the amount in controversy to support the federal court's diversity jurisdiction at the time of removal. This Court should not rescue Dart, one defendant, from its evidentiary failure. Dart's petition for *writ of certiorari* should be denied.

SALIENT FACTS

The state court class action petition made no allegation about the amount in controversy because only Dart possessed the royalty paydecks and gas contracts containing the data necessary to calculate class-wide damages. Pet. App. 16a, 20a, 27a. Dart timely removed but only alleged in the notice of removal that the amount in controversy was met. *Id.* 40a at ¶¶ 14-15. (stating: "DCBO has undertaken to quantify the amount of additional royalties that would be owed if all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made. Based upon this calculation of Plaintiff's putative class claims, the amount of additional royalty sought is in excess of

$8.2 million.").[7] Dart offered no evidence of its calculation of jurisdictional facts with the notice of removal. Pet. App. 37a-42a. One hundred seventy-seven (177) days after the deadline for removal and after plaintiff Owens had moved for remand, Dart filed a declaration to support the allegations about the amount in controversy with its opposition to Owens' motion to remand. Pet. App. 16a, 20a. That declaration showed Dart had evidence of the amount in controversy available to it at the time of removal. *Id.* 24a, 27a.[8]

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[7] Like the "naked assertion" of an impermissible conspiratorial agreement in *Bell Atlantic v. Twombly*, 550 U.S. 544, 556-57 (2007), Dart's "naked assertion" that the amount in controversy is $8.2 million is conclusory and devoid of "enough factual matter," indeed "any factual matter," to back it up. If such a naked allegation in a complaint is insufficient for a "plain statement" under Fed. R. Civ. P. 8(a)(2), it is likewise insufficient for a "plain statement" for removal under §1446(a). *Id.* at 557. *See* Pet. 10 (analogizing the pleading standards of Rule 8 and §1446(a)).

[8] Contrary to unfounded fear professed in the Chamber's Brief that "defendants sued in state court in the Tenth Circuit" would have to "amass voluminous evidence to support the filing of a notice of removal," Mot. ii, Brf. 2, 3, Dart would have only had to disclose in a declaration what it did to calculate the class-wide amount in controversy at the time of removal so plaintiff and the district court would have had "enough factual matter" to evaluate the evidence and whether it fully supported Dart's calculation of the amount in controversy. *See* p. 6, n.5, *supra*. The Chamber misunderstands the issue which is about Dart's failure to submit *any* evidence to support the amount in controversy allegation, not the sufficiency of the evidence. Brf. 3.

ARGUMENT AND AUTHORITIES

I. The Tenth Circuit Rule Strictly Construes the Removal Statutes by Requiring the Removing Party to Present Evidence of the Amount in Controversy with the Filing of the Notice of Removal to Ensure the Federal District Court's Subject Matter Jurisdiction.

Dart did not meet its burden "to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds "the jurisdictional minimum" and to "prove [those] jurisdictional facts by a preponderance of the evidence." *Frederick*, 683 F.3d at 1245-46. To carry a burden a removing party must present evidence of "underlying facts" to "support" the "assertion" of the amount in controversy. Dart simply presented **no evidence** at the time of removal which, of course, cannot carry any burden of proof, no matter how light. *See Frederick*, 683 F.3d at 1245 ("In support of its amount-in-controversy calculation, Hartford attached an affidavit of the Hartford employee who calculated the sum."). *See also Laughlin*, 50 F.3d at 873; *Martin*, 251 F.3d 1284 (10th Cir. 2001) (suggesting that evidence submitted in response to a motion to remand should not be considered); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F.Appx. 775 (10th Cir. 2005) (refusing to consider an affidavit because it was not attached to the Notice of Removal); Pet. App. 3 (recognizing that the district court's decision here was "not an unreasonable interpretation of the language in some of this court's

opinions").[9] The Tenth Circuit has required evidence to support jurisdictional facts for more than a decade, without incident and without the travails Dart and the Chamber suggest.

As the district court acknowledged, post-removal evidence is allowed only in very limited circumstances – that do not exist here: (a) the evidence is presented within the 30-day time for removal and the notice of removal is deemed amended, Pet. App. 10a n.8 (citing *Pepsi-Cola Bottling Co. v. Bottling Group, LLC*, No. 07-2315-JAR, 2007 WL 2954038, at **4, 7-8, 12) (D. Kan. Oct. 10, 2007); (b) the evidence is not in the defendant's possession at the time of removal and some discovery is necessary, Pet. 7 n.1 (noting the Tenth Circuit exception when a defendant has "no information from which to establish the amount of damages" and "request[s] leave to conduct discovery on the amount in controversy"); *See also Aranda v. Foamex International*, 884 F.Supp.2d 1186 (D.N.M. 2012); or, (c) plaintiff offers the evidence to clarify an ambiguous state court petition, but not to contradict or change it. Pet. App. 10a, n.8

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[9] Dart's use of post-removal confidential mediation negotiations is likewise unavailing. The district court noted the Tenth Circuit permits evidence of settlement proposals and estimates to establish the amount in controversy only when those facts occur before the removal and are submitted with the notice of removal. *Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR, 2013 WL 2237740, at *5 (D. Kan. May 21, 2013) (citing *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008)); Pet. App. 27a. That did not happen here.

(citing *Hebner v. Bay Transport, Inc.*, No. 09-2141-KHV, 2009 WL 1254442 (D. Kan. May 5, 2009)). Otherwise, post-removal evidence is not allowed. Pet. App. 10a n.8 (citing *Coca-Cola Bottling of Emporia, Inc. v. South Beach Bev. Co.*, 198 F.Supp.2d 1280, 1283 (D. Kan. 2002) and *Lichfield v. Int'l Survivors Action Comm.*, No. 2:05-CV-254-TC, 2005 WL 1484520, **3-4 (D. Utah June 22, 2005). *See also Herndon v. Am. Commerce Ins. Co.*, 651 F.Supp.2d 1266, 1269-72 (N.D. Okla. 2009) (remanding UM motorist coverage claim where defendant did not provide an affidavit or "any economic analysis" with the removal notice)). This bright-line rule facilitates the application of the removal and remand statutes and the case law construing them.

II. The Tenth Circuit Rule Does Not Conflict with Rules in Other Circuits.

Contrary to Dart's argument urging construction of the removal statutes to allow the removing party to withhold evidence on the amount in controversy until months after removal, the Tenth Circuit's "show-it-if-you've-got-it" rule is *not* at odds with the other circuits. Pet. 10-12. Indeed, most of the cases Dart cites simply show that the district court may consider evidence submitted with the notice of removal or within the 30-day window for removal. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 770 (11th Cir. 2010) ("notice of removal included the declaration" of the CFO declaring that the defendant had "collected more than $ 5 million in condominium unit purchase deposits "); *Sierminski v. Transouth Fin. Corp.*,

216 F.3d 945, 947-48 (11th Cir. 2000) (declaration of the defendant's human resources director filed within 15 days after filing the notice of removal and within the 30-day window for removal satisfied removing party's burden to establish removal jurisdiction by a preponderance of the evidence at the time of removal). Providing evidence to support jurisdictional facts within the 30-day removal window comports with the Tenth Circuit Rule and encourages early disclosure and evaluation of jurisdictional facts. For these reasons, among others, the same district judge who granted remand in this case denied remand in another case when she permitted amendment of the notice of removal within the 30-day removal window to "specify the facts providing a basis" for the district court's diversity jurisdiction. *Pepsi-Cola Bottling Co.*, 2007 WL 2954038, at **3-4. These cases show that, rather than being in conflict, the Tenth and Eleventh Circuits are in step with each other.[10]

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[10] *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), mentioned once in a string cite in Dart's Petition at page 10, illustrates this point. *Lowery* granted remand because, like Dart, the defendant failed to present any evidence to sustain its burden on the amount in controversy. The court discussed the difficulty of applying the "preponderance of evidence" standard to "naked pleadings," including a notice of removal devoid of evidence. 483 F.3d at 1209-10. Like the Tenth Circuit, the Eleventh Circuit held that only removal documents are to be considered. *Id.* at 1213-14. This was true even though the removing defendant in *Lowery*, unlike Dart here, did not have the evidence on the amount in controversy. *Id.* at 1213 n.63. No case supports Dart's position that the removing defendant can

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The First Circuit also is not in conflict. Pet. 11 (citing *Amoche v. Guarantee Trust Life Inc. Co.*, 556 F.3d 41, 51-53 (1st Cir. 2009) (affirming the district court's remand order)). In *Amoche*, the removing defendant filed its evidence at the time of removal. *Id.* at 45. In opposition to plaintiff's motion to remand, defendant added post-removal evidence estimating damages, which plaintiff did not oppose as untimely, but did oppose on substance. *Id.* at 46-47 (arguing that defendant inflated the number of class members by including people who did not meet the class definition and who were outside the geographic scope of the action).[11] On the evidence, the *Amoche*

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withhold the evidence it had at the time of removal and rely on a naked notice of removal to sustain its burden of proof on facts necessary to the district court's jurisdiction. And certainly *Lowery* does not. *Id.* at 1221 ("defendants' notice of removal contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeds that amount and, as such, they are unable to establish federal jurisdiction by a preponderance of the evidence."). This holding is consistent with the Tenth Circuit Rule.

[11] This demonstrates another reason why a "naked" notice of removal is insufficient to establish the amount in controversy. Without evidence, the plaintiff has no way of knowing the facts the removing party is relying on to establish the amount in controversy. In *Amoche*, plaintiff argued and the district court found the defendant's evidence inflated the class size to achieve the requisite amount in controversy for jurisdiction. The *Amoche* court also rejected the "notice pleading" standard that Dart suggests. Pet. 13. Accepting naked allegations that the jurisdictional threshold was met would conflict with the right of plaintiff to choose his forum. *Amoche*, 556 F.3d at 49-50.

court found defendant did not carry its burden on the amount in controversy and noted a consideration is which party has better access to the relevant information. *Id.* at 51. Here, while Dart had access to all of the information about the amount in controversy, it simply chose not to present it at the time of removal. *Amoche* is entirely consistent with Tenth Circuit law and does not support Dart's withholding evidence for months after filing the notice of removal.

The unpublished Fourth Circuit case Dart cites also affirmed remand because defendant relied on a "wholly unsupported assumption that members of the plaintiff class will claim to have worked an average of five hours of overtime pay per week." Pet. 11 (citing *Bartnikowski v. NVR, Inc.*, 307 F.Appx. 730, 732, 735-37 (4th Cir. 2009) (unpub.)). The case does not show that plaintiff objected to defendant's submission of post-removal evidence. Perhaps that is because the evidence was subject to easy attack and the district court granted remand anyway.

Dart also cites *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir. 2008) in which the district court *sua sponte* remanded the case six days after the notice of removal was filed. *Id.* at 192, 195. Because the remand order was based on a pleading defect not raised by the plaintiff in a motion to remand or in any other motion, the Fourth Circuit reversed and remanded the case to the district court to actually determine whether it had subject matter jurisdiction. *Id.* at 197-99. Moreover, the state court complaint sought "actual, incidental, consequential,

and punitive damages" arising from plaintiff's purchase in August 2003 of a 2003 American Eagle 40MS recreational vehicle and "replacement of the vehicle or refund of the purchase price" which, although not stated in the complaint, was known to both the plaintiff and to the defendant who sold plaintiff the vehicle to greatly exceed the requisite $75,000 amount in controversy. *Id.* at 194. Indeed, upon remand from the Fourth Circuit, the case remained in federal district court. *Ellenburg v. Tom Johnson Camping Center, Inc.*, No. 8:06-cv-01606-HFF (D.S.C., Anderson Div.) (ECF docket sheet).

Without following the statutory removal and remand procedure and litigants having the opportunity to brief the issues, it is unsurprising the Fourth Circuit reversed the district court and remanded the case. But, in this case, Owens did timely raise the procedural defect in his motion to remand and, rather than a *sua sponte* order, the district court remanded this case "for lack of subject matter jurisdiction," not for any procedural defect, after evaluating Dart's notice of removal and the substantial remand briefing. Pet. App. 28a.

As for the one paragraph of dicta in *Ellenburg* that suggests a naked allegation in a notice of removal may be sufficient, there was no substantial analysis of the issue, and the record below contained no

briefing on the issue. 519 F.3d at 199.[12] Dart then cites to the same legislative history which Owens addresses in the next section. The only other citations are to *Twombly* which Owens addresses at p. 12, n.7, *supra*, and *In re Blackwater Security Consulting, LLC*, 460 F.3d 576, 583 (4th Cir. 2006), for the common proposition that "[t]he party seeking removal bears the burden of demonstrating that removal jurisdiction is proper." Notably, *Blackwater* addressed removal for federal question jurisdiction and not diversity jurisdiction so it does not address the amount in controversy requirement for diversity jurisdiction which is at issue in this case.

The most recent opinion from the United States District Court for the District of South Carolina to address the amount in controversy requirement for diversity jurisdiction on a motion to remand limits *Ellenburg* to "situations where a district court remands a case based on a procedural defect in the notice of removal" and "does not prevent a court from remanding a case based on substantive jurisdictional grounds." *Lever v. Jackson Nat. Life Ins. Co.*, No. 3:12-CV-03108-MBS, 2013 WL 436210, *4 (D.S.C. Feb. 5, 2013) (remanding case because defendant failed to prove, "by any standard" satisfaction of the

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[12] Relying on more than two centuries of this Court's precedent, one district court recently and cogently rejected *Ellenburg* reasoning and granted remand where the defendant failed to place jurisdictional facts in the record. *Anthony Marano Co. v. Sherman*, 925 F.Supp.2d 864, 866, n.1 (E.D. Mich. 2013).

amount in controversy.) (unpub.); *accord Wickline v. Dutch Run-Mays Draft, LLC*, 606 F.Supp.2d 633, 636 (S.D.W. Va. 2009) (concluding "the Fourth Circuit [in *Ellenburg*] did not change the analysis used to rule on a motion to remand" and the acceptance of a naked allegation applies only "where a district court examines the sufficiency of the notice of removal *sua sponte* in search of a procedural defect."). Although a removing defendant has "sufficiently *pled* jurisdiction, [d]efendant is nevertheless required to show by a preponderance of the evidence that [federal] jurisdiction is proper." *Id.* at 636-37 (emphasis in original) (granting remand on record "entirely devoid of any evidence regarding the amount in controversy requirement" at the time of removal). The unique circumstances of *Ellenburg* do not demonstrate a conflict in removal procedure with the Tenth Circuit Rule. Indeed, as this Court has held since at least 1799, the Tenth Circuit Rule facilitates an early and evidence-based determination of the federal court's subject matter jurisdiction.

Nor is the Fifth Circuit different as Dart contends. *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 882 (5th Cir. 2000) ("district court denied the motion to remand because Plaintiff 's petition at the time of removal alleged injuries that exceeded the $75,000 requirement," any reference to post-removal or even contemporaneous removal evidence would have been irrelevant). In *Gebbia*, the Fifth Circuit described the "clear analytical framework for resolving disputes concerning the amount in controversy" where the

initial pleading cannot state an amount for the claimed damages: "the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. [Citation omitted]. The defendant may prove that amount either by demonstrating that the claims are likely above $75,000 in sum or value, or by setting forth the facts in controversy that support a finding of the requisite amount." *Id.* at 882-83 (citing other Fifth Circuit cases). But, because it was "facially apparent" from the state court petition that the claimed damages exceeded the jurisdictional amount of $75,000, the Fifth Circuit affirmed the district court's denial of plaintiff's motion to remand filed almost two years after removal. *Id.* at 882-83.

The district court here recited a framework similar to the Fifth Circuit's:

> The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. If the jurisdictional amount is not shown by the allegations of the complaint, "[t]he burden is on the party requesting removal to set forth, in the notice of removal itself, the 'underlying facts supporting [the] assertion that the amount in controversy exceeds [$75,000]. In other words, the amount in controversy must be affirmatively established on the face of either the petition or the notice of removal. The Court narrowly

> construes removal statutes and all doubts must be resolved in favor of remand.

Pet. App. 17a-18a. Here, the district court found that it is not "facially apparent" from the state court petition that the amount in controversy exceeds $5 million. Pet. App. 25a, 29a. The district court found Dart, as the removing party, had the burden to put on some evidence at the time of removal showing the amount in controversy exceeded $5 million. This Dart did not do. Pet. App. 26a. The Fifth Circuit is not in conflict with the Tenth Circuit Rule requiring the removing party to demonstrate by a preponderance of evidence that the prerequisites for the federal court's jurisdiction are satisfied.

Nor is the Seventh Circuit at odds with the Tenth Circuit. *Harmon v. OKI Sys.*, 115 F.3d 477, 478-79 (7th Cir. 1997) (denying remand which was not made until two years after removal, after two years of discovery in federal court, and on the eve of summary judgment which was granted, and noting that the removal notice "was no model to emulate" and that defendant Crown "did not know the exact amount in controversy when the case started"), *cert. denied*, 522 U.S. 966 (1997). In *Harmon*, unlike here, defendant could not present evidence of the amount in controversy at the time of removal; discovery was necessary, was not objected to, and the same outcome would result under the Tenth Circuit Rule.

The Ninth Circuit may not be at odds with the Tenth Circuit Rule either. Pet. 10-12 (citing *Singer v.*

State Farm Mut. Auto, Inc., 116 F.3d 373, 376-77 (9th Cir. 1997) and *Janis v. Healthnet, Inc.*, 472 F.Appx. 533, 534-35 (9th Cir. 2012) (unpub)). Below, Dart also cited *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 690-91 (9th Cir. 2006), but apparently shies away from *Abrego* now because it supports the Tenth Circuit Rule. *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-603 (10th Cir. July 5, 2013) (ECF Doc. #01019085396). Properly read, *Abrego* allowed post-removal discovery (admissions or stipulations) from the plaintiff who had the jurisdictional evidence, the same as the Tenth Circuit allows. 443 F.3d at 690-91. *Singer* is to the same effect. 116 F.3d at 376. That is not this case. While *Janis* appears contrary to the Tenth Circuit rule, it is a one page unpublished memorandum opinion that has never been cited again by any court, not even in the Ninth Circuit. This is hardly the basis for a one circuit conflict. Also the practice in the Ninth Circuit appears to be like the Tenth Circuit where evidence is filed with the notice of removal. *See*, e.g., *Friend v. Hertz Corp.*, No. 3:07-cv-05222-MMC (N.D. Cal. Oct. 11, 2007) (ECF Doc. #2, Decl. of Krista Memmelaar).

III. The Tenth Circuit Precedent Is Consistent with the Plain Language of the Removal Statutes, the Class Action Fairness Act (Which Is Irrelevant on the Issue), and this Court's Precedent.

Dart erroneously focuses on 28 U.S.C. §1446(a) requiring the notice of removal to contain a "short

and plain statement of the grounds for removal," which Dart reads to mean only allegations, not evidence. Pet. 13-14. But that was never at issue. Instead, below and still, Dart ignores §1446(c)(2)(B) which requires the district court to find by a preponderance of evidence the amount in controversy requirement for subject matter diversity jurisdiction met.[13] The problem was not the allegation under §1446(a), but the total lack of "evidence" submitted with the notice of removal to satisfy §1446(c). The Tenth Circuit precedent simply holds that the removing defendant that has evidence of the amount in controversy must submit that evidence to provide at least some factual basis for the amount in controversy with the notice of removal. Nothing in §1446 suggests to the contrary. And, CAFA comports with that "present the evidence on removal" position because if a defendant in a class action lacks evidence of the amount in controversy initially, it can conduct discovery in the state court action and then remove the action upon receipt of evidence showing the amount in controversy is satisfied – generally an admission from plaintiff in response to interrogatories, requests

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[13] Dart admits that the "preponderance of evidence" standard applies in class action removals, arguing instead that the standard should not be applied until some undetermined time later in the federal court litigation. Thus, whether §1446(c)(2)(B) and the Federal Courts Jurisdiction and Venue Clarification Act of 2011 applies to class actions or not, it is undisputed that the "preponderance of evidence" standard applies in this case.

for admission, requests for production, or a settlement demand. 28 U.S.C. §1453(b) (exempting class actions from 1-year limit on removal under §1446(c)(1) that applies to all other civil actions). So, contrary to the Chamber's lamentations, a defendant in a class action need not rush to remove a class action until it has evidence that the prerequisites for federal subject matter jurisdiction are satisfied.

Dart notes that §1446 was amended in 2011 (effective January 6, 2012) by the Federal Courts Jurisdiction and Venue Clarification Act ("JVCA"). Pet. 14-15. However, Dart fails to mention that the JVCA only applies to §1332(a) removals, not to §1332(d) class action removals even though the dissent to the order denying Dart's petition for rehearing en banc stated as much. Pet. App. 11a ("Interestingly, the JVCA, perhaps through inadvertence, explicitly applies to standard diversity removals but apparently does not apply to removals under CAFA.").

The opposite is true in non-class action removals based on diversity jurisdiction under §1332(a), which is the type of removal addressed by the JVCA. In non-class action removals, plaintiff often has evidence of the amount in controversy. *See*, e.g., *Ellenburg*, 519 F.3d 192 (purchase price of motorhome). The House Judiciary Committee Report on the JVCA reflects this dichotomy of placing the burden of producing evidence at the earliest opportunity on the party most likely to have that evidence. H.R. Rep. No. 112-10, at 16 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580 ("judicial resources may be wasted and the

proceedings delayed when little or no objective information accompanies the notice of removal."). So a defendant possessing evidence of the amount in controversy should present it on removal and a defendant without such evidence can conduct jurisdictional discovery to get the evidence from plaintiff and then remove a class action. Pet. 14.[14] Nothing in the House Judiciary Committee Report suggests that defendants can withhold evidence on the amount in controversy at the time of removal and put that evidence in the record months after removing the case and months after plaintiff has filed the motion to remand. Thus, the House Judiciary Committee Report provides no aid to Dart's argument.

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[14] *Lowery* holds that conducting jurisdictional discovery in federal court before the amount in controversy is proven is improper. *See* 483 F.3d at 1216 (also denying jurisdictional discovery to defendant in an effort to prove the amount in controversy). Nothing in the text of the JVCA suggests *Lowery* is wrong even though it is inconsistent with the House Report. That is why determining legislative intent from committee reports or speeches given by bill sponsors is dubious and they are not the "law." And, as this Court has said before, Congress's "authoritative statement is the statutory text, not the legislative history." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005)); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-50, n.4 (2002). Accordingly, Dart's and the Chamber's reliance on legislative history does not advance its desire to reverse centuries of federal law that jurisdictional facts must be supported in the court record at the time of removal. *See* 19, n.13, *supra*.

Both before and after the JVCA, in the removal of individual cases based on standard diversity jurisdiction under §1332(a) (cases to which the JVCA actually does apply), district courts in the Tenth Circuit have held pursuant to longstanding Tenth Circuit precedent that conclusory allegations about the amount in controversy are not enough to establish federal court subject matter jurisdiction. *See Coca-Cola Bottling of Emporia, Inc. v. South Beach Beverage Co., Inc.*, 198 F.Supp.2d 1280, 1282-84 (D. Kan. 2002); and *Butler v. Target Corp.*, No. 12-4092-SAC, 2012 WL 5362974, *3 (D. Kan. Oct. 31, 2012) (recognizing the JVCA "largely codified the holding of *McPhail*"). Dart's naked allegations do not satisfy its burden to prove satisfaction of the amount in controversy to establish federal subject matter jurisdiction under §1332(d). It must present evidence to enable the district court to find "by a preponderance of the evidence" that the amount in controversy is satisfied.

CAFA says nothing about the "preponderance of evidence" standard in 28 U.S.C. §1446(c)(2)(B). But §1453(b) says §1446 applies to the removal of class actions except for the 1-year limitation under §1446(c)(1). All other provisions of §1446, including the preponderance of the evidence standard in §1446(c)(2)(B), apply to class actions by operation of §1453(b). CAFA does not eliminate the "preponderance of the evidence" standard for removal as Dart suggests. Pet. 16 (citing only the Statement of Rep. Jim Sensenbrenner in 151 Cong. Rec. H723, H727 (daily ed.) February 17, 2005). Dart tacitly

acknowledges that "pre-CAFA precedent" is still good law by repeatedly citing to it. App. to Resp. 5a-6a. Nothing suggests that the removal procedure is or should be any different after CAFA's enactment in 2005.

This Court did not hold or suggest in *McNutt* or in *Hertz* that a removing defendant can withhold evidence and establish jurisdiction with only naked allegations. Dart relies on *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936), which found that a plaintiff could allege jurisdictional facts in his complaint, but if defendant contested those facts with evidence, a preponderance of evidence determination would have to be made. *McNutt* was not a removal case, however. And, courts have repeatedly rejected Dart's attempt to analogize removal to pleading allegations in a complaint. Dart's argument overlooks the obvious differences between an initial pleading to establish jurisdiction and a notice of removal to replace state court general jurisdiction with federal court limited jurisdiction.

> The burden on a plaintiff seeking diversity jurisdiction is forgiving: if, in good faith, the plaintiff pleads more than the requisite amount in controversy, that pleading will be accepted unless it can be shown to a legal certainty that the plaintiff cannot collect that amount. Removing CAFA defendants have similarly sought a rule enabling them simply to allege that more than $5 million is in controversy. However, the courts have rejected the analogy.

Newberg on Class Actions §6:16 (5th ed.) (footnotes 8-9 omitted). Second, as previously stated, the removing party bears the burden of proof to show jurisdictional facts at the time of removal before stripping plaintiff of his chosen state court forum. *See* 14C Wright, Miller & Cooper, *Federal Practice and Procedure* §3725, at 95 (3d ed. 1998) (recognizing that "a greater burden [is imposed] on defendants in the removal situation than is imposed on plaintiffs who wish to litigate in federal court by invoking its original jurisdiction" to demonstrate the amount in controversy but that "[t]his discrepancy in treatment of plaintiffs and defendants may be justified by the historical tradition that the plaintiff is the master of the forum and is empowered to choose the court system and venue in which litigation will proceed").

Dart's citation to dicta taken out of context from *Hertz Corp. v. Friend*, 559 U.S. at 96-97, illustrates Dart's desperation to equate the "plaintiff allegation" language in *McNutt* with a "removing defendant allegation." Pet. 15. But *Hertz* does not say that. In fact, *Hertz* filed the referenced declaration to provide evidence of the jurisdictional facts asserted in its notice of removal. *Friend v. Hertz Corp.*, No. 3:07-cv-05222-MMC (N.D. Cal.) (ECF Doc. #2, Declaration of Krista Memmelaar). So factually, Hertz submitted evidence to sustain its burden of proof on jurisdiction at the earliest opportunity and plaintiff did not challenge that declaration. *Hertz*, 559 U.S. at 97.

Legally, the authority cited in *Hertz* also supports Owens' position that the removing party must

present evidence of facts necessary for the federal district court to find subject matter jurisdiction with its notice of removal. *Hertz* generally cites to *McNutt* and to 15 Moore's §102.14, at 102-32 to 102-32.1 (citing in n.5, *United Food Local 919 v. Centermark Props.*, 30 F.3d 298, 301 (2d Cir. 1994); *Janzen v. Goos*, 302 F.2d 421, 424 (8th Cir. 1962) and *Trimble v. Asarco, Inc.*, 232 F.3d 946, 959 (8th Cir. 2000)). *United Food* was a removal case, which stated:

> Applying these principles, we must determine from the record before us whether the defendants can establish a basis for either diversity or federal question jurisdiction. *See* 14A Wright & Miller § 3723, at 311-12 (***usual rule is that removability is determined from the record as of the time the petition for removal is filed*** but where basis of removal is diversity then diversity of citizenship must exist at time action was filed in state court as well as at time of removal).

United Food, 30 F.3d at 301 (emphasis added). *Janzen* and *Trimble* were not removal cases. In short, *Hertz* and *McNutt* do not address the issue here.

Finally, while Dart properly notes that this Court unanimously rejected the "form over substance" stipulation of less than $5 million by plaintiff in *Standard Fire*, Dart then proffers their own "form over substance" argument – that a removing defendant who bears the burden to establish federal jurisdiction can withhold evidence of jurisdictional facts in

its possession and simply allege satisfaction unless plaintiff, the party who does not bear the burden of proof and who may lose the chosen state court forum for his dispute, challenges that naked allegation. In the class action context and at the pleading stage, plaintiff has no evidence of the amount in controversy with which to challenge a naked allegation in a notice of removal which is why the statutory removal procedure in §§1446 and 1453 and the long-standing Tenth Circuit law require the removing defendant to provide evidence of jurisdictional facts in the notice of removal and at the time of removal. This Court should reject Dart's form (allegation only) over substance (evidence) argument and hold true to centuries of its precedent that the party asserting federal jurisdiction bears the burden to prove it. *See* p. 19, n.13, *supra*. When the removing defendant has the substance (evidence of jurisdictional facts) to provide to the Court at the time of the removal, simplicity and common sense direct defendant to do so, in order that plaintiff can evaluate that evidence and challenge it if there is a basis to do so by seeking remand.

CONCLUSION

The Tenth Circuit Rule requires no change. It works as it is supposed to. The party with the evidence must present it at the first opportunity – a removing defendant with the notice of removal or a remanding plaintiff with the motion to remand. The only exception for both is if they do not have the

evidence. Then they must move for discovery to get the evidence needed. The rule is simple and easy to apply. Plaintiff chooses the forum for his lawsuit unless the defendant produces evidence showing federal jurisdiction which then overrides plaintiff's choice. The applicable burden of proof varies among circuits, but the burden of proof is not before the Court here because Dart submitted no evidence timely. An allegation or an assertion, without evidence, of federal jurisdiction does not suffice to carry the removing party's burden to establish federal jurisdiction at the time of removal. That has been the law for centuries and should remain as the law. Dart's petition for *writ of certiorari* should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, AND CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

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PETITIONERS' REPLY BRIEF

Grasping for ways to hide the Tenth Circuit's break from 28 U.S.C. § 1446(a)'s plain language and from at least seven other Circuits' decisions, Respondent distorts the record and purports to harmonize cases that defy harmonization. But no amount of spin can alter the facts. The circuit split is real: In one corner stand (at least) the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, which—following § 1446's plain language—require a notice of removal to contain only allegations (not evidence) of the jurisdictional facts supporting removal. In the other corner stands the Tenth Circuit—alone—requiring (not merely permitting) a defendant to attach evidence to the notice of removal.

The Tenth Circuit's rule betrays the statutory language, which requires only a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Petitioners were denied access to the federal courts even though the case satisfies CAFA's jurisdictional requirements. This Court should grant *certiorari* to correct the Tenth Circuit's rogue approach to removal.

I. THE CIRCUIT SPLIT IS REAL (AND LOPSIDED).

Respondent spends several pages trying to explain away the circuit split. In certain instances, he seizes on inconsequential factual differences; in others, he mischaracterizes a case's holding. But as Respondent surely appreciated as he went through that exercise, "[f]acts are stubborn things." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (Dec. 1770).

The stubborn facts: At least seven other circuits, in contradistinction to the Tenth Circuit, do not require a defendant seeking removal to attach evidence to the notice of removal. They require only what § 1446 requires—"a short and plain statement of the grounds for removal":

Eleventh Circuit: In *Sierminski v. Transouth Financial Corp.*, 216 F.3d 945 (11th Cir. 2000), the court *rejected* the Tenth Circuit's "restrictive approach." The defendant submitted no evidence with its notice of removal, but attached a declaration concerning defendant's records to its response to the motion to remand. *Id.* at 947. The Eleventh Circuit rejected the plaintiff's argument that "defendant must submit evidence" with the notice of removal and held "there is no good reason to keep a district court from eliciting or reviewing evidence outside the removal petition." *Id.* at 948-49.

In *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), the Eleventh Circuit—observing that "Section 1446(a)'s requirement of 'a short and plain statement of the grounds for removal' is consonant with the pleading requirements of Rule 8(a)"—held that "[j]ust as a plaintiff bringing an original action is bound to assert jurisdictional bases under Rule 8(a), a removing defendant must also allege the factual bases for federal jurisdiction in its notice of removal under § 1446(a)." *Id.* at 1216-17 & n.73.

And in *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir. 2010), a CAFA case, the Eleventh Circuit again rejected the argument that a defendant had to submit evidence with its notice of removal and held that "the jurisdictional evidence that [defendant] attached to its opposition to remand should *not* have been excluded merely because it was submitted in

response to the plaintiff's motion to remand." *Id.* at 774 (emphasis added).

Ninth Circuit: In *Janis v. Health Net, Inc.*, 472 F.Appx. 533 (9th Cir. 2012) (unpublished)—a case that is factually indistinguishable from this one—the defendant "sufficiently alleged" the requirements for CAFA jurisdiction in the notice of removal, but attached no evidence. *Id.* at 534. In response to a motion to remand, the defendant submitted evidence available to it at the time of removal. *Id.* at 535. The district court refused to consider the evidence because it was not submitted with the notice. *Id.* at 534. The Ninth Circuit reversed because "[n]othing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal. Section 1446(a) requires merely a 'short and plain statement of the grounds for removal.'" *Id.* at 534. *See also Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 374, 376-77 (9th Cir. 1997) (removal was proper even though defendant attached no evidence to its notice of removal).

Eighth Circuit: In *Hartis v. Chicago Title Insurance Co.*, 694 F.3d 935 (8th Cir. 2012), a CAFA case which Respondent does not attempt to reconcile with the Tenth Circuit precedent, the Eighth Circuit held that "[t]he removing party's burden of describing how the controversy exceeds $5 million constitutes a pleading requirement, not a demand for proof." *Id.* at 944-45 (internal quotation marks omitted).

Seventh Circuit: In *Spivey v. Vertrue, Inc.*, 528 F.3d 982 (7th Cir. 2008) (Easterbrook, C.J.), also a CAFA case, the Seventh Circuit held that "[t]he removing party, as the proponent of federal jurisdiction, bears the burden of describing how the

controversy exceeds $5 million. This is a *pleading requirement*, not a demand for proof." *Id.* at 986 (emphasis added).

And in *Harmon v. OKI Systems*, 115 F.3d 477 (7th Cir.), *cert. denied*, 522 U.S. 966 (1997), the court rejected the Tenth Circuit's *Laughlin* decision, along with the plaintiffs' position that the "courts are limited to the evidence in the record when removal is sought" and, instead, considered post-removal evidence because the "test should simply be whether the evidence sheds light on the situation which existed when the case was removed." *Id.* at 479-80.

Fifth Circuit: In *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966), the Fifth Circuit, citing § 1446(a)'s requirement of a "short and plain statement," held that "the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings." *Id.* at 340. *See also Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (concluding "post-removal affidavits may be considered in determining the amount in controversy at the time of removal").

Fourth Circuit: In *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir. 2008), the Fourth Circuit "h[e]ld that the Notice of Removal's allegations were sufficient as a matter of law to allege subject matter jurisdiction." *Id.* at 199. Noting that the "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure," the court "conclude[d] that it was inappropriate for the district court to have required a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint." *Id.* at 199-200. *See also Bartnikowski v.*

NVR, Inc., 307 F.Appx. 730, 732-33, 735-37, 739 (4th Cir. 2009) (unpublished) (considering the defendant's payroll director's declaration proffered in response to a motion to remand in deciding whether CAFA's $5 million threshold was satisfied).

First Circuit: Contrary to Respondent's assertion (Opp. 19), in *Amoche v. Guarantee Trust Life Insurance Co.*, 556 F.3d 41 (1st Cir. 2009), the defendant did *not* attach any evidence to its notice of removal. *Id.* at 45-46. Instead of requiring as much, the First Circuit held that "the entire record must be evaluated" to decide whether removal is proper and considered an affidavit concerning information from the defendant's records submitted in response to the motion to remand. *Id.* at 46, 51.

* * *

Tenth Circuit: Against these seven circuits stands the Tenth Circuit with its contrary rule that a defendant seeking removal must attach evidence to the notice of removal. As the District Court put it below, "the Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." App. 26 (citing *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir.), *cert. denied*, 116 S.Ct. 174 (1995); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); and *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F.Appx. 775 (10th Cir. 2005) (unpublished)).

Petitioners' removal petition would have turned out differently in the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits than it did in the Tenth Circuit. In each of those circuits, the district court would have considered Petitioners' evidence

submitted in response to Respondent's motion to remand, would have found the CAFA requirements were satisfied, and would have upheld federal jurisdiction.

II. THE TENTH CIRCUIT'S RULE FLOUTS THE PLAIN STATUTORY LANGUAGE.

Congress engrafted Rule 8's notice-pleading language into the removal statute and eliminated any evidentiary requirement long ago. *See* Pet. 13-14. Respondent concedes (as he must) that 28 U.S.C. §1446(a) does not require a defendant seeking removal to attach evidence to the notice of removal. Instead, Respondent argues that §1446(a) "was never at issue" and that Petitioners "ignore[] §1446(c)(2)(B) which requires the district court to find by a preponderance of evidence the amount in controversy requirement" was satisfied. Opp. 26-27.[1]

Respondent misses the point. The question presented is not whether the district court had to find the jurisdictional facts by a preponderance of the evidence. It did. The question presented is whether the district court erred in refusing to consider (conclusive) evidence of the jurisdictional facts simply because Petitioners did not attach the evidence to their notice of removal. It did. Under § 1446(a), a notice of removal must contain a "short and plain *statement* of the grounds for removal," not evidence

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[1] Petitioners did not, of course, ignore § 1446(c)(2)(B). They showed how that subsection and subsection (A), both of which were codified as part of the JVCA (*see* App. 9-10), require evidence *only after* a plaintiff has challenged the allegations in a notice of removal. Pet. 14-16. The principle that the evidentiary burden arises after a challenge to the jurisdictional allegations is rooted in this Court's own jurisprudence, which served as a model for the JVCA. App. 8-10.

supporting removal. (Emphasis added.) The evidence can come later in a response to a motion to remand.

Contrary to Respondent's assertion (Opp. 14 n.7), Petitioners' notice of removal contained detailed allegations of the jurisdictional facts. App. 4 ("there should be no dispute that Petitioner[s'] notice of removal was adequate, even if we apply *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)"). In response to the motion to remand, Petitioners submitted evidence that conclusively established federal jurisdiction. *See* Pet. 6, 9, 17; App. 2-3, 7; 20-21; 75-90. The district court's decision to ignore that evidence simply because Petitioners did not attach it to the notice of removal cannot be squared with § 1446(a)'s plain language.[2] For that reason, this case is also ripe for summary reversal. *See* S. Ct. R. 16.

* * *

Although Respondent suggests otherwise (*see* Opp. 12), Judge Hartz emphasized in his dissent from the denial of rehearing *en banc* that this case may be the only opportunity to correct the Tenth's Circuit's erroneous approach to removal:

> Unfortunately, this may be the only opportunity for this court to correct the law in our circuit. After today's decision, any diligent attorney (and one can assume that an attorney representing a defendant in a case involving at least $5 million—the threshold for removal under CAFA—would have substantial incentive to be diligent) would

---

[2] Moreover, by placing higher burdens on defendants and requiring remand of cases that satisfy the CAFA requirements, the Tenth Circuit precedent runs counter to the very purpose of CAFA. *See* Pet. 15-17; U.S. Chamber *Amicus* Br. 12-16.

> submit to the evidentiary burden rather than take a chance on remand to state court; if so, the issue will not arise again.

App. 2 (Hartz, J., dissenting); *see also* U.S. Chamber *Amicus* Br. 11-12. The net result, Judge Hartz concluded, is that defendants seeking removal in the Tenth Circuit will continue to face "an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court." App. 2. This Court should seize this opportunity to correct the Tenth Circuit's wayward approach.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, *ET AL.*,
Petitioners,

v.

BRANDON W OWENS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

DART CHEROKEE BASIN OPERATING COMPANY, LLC, *ET AL.*,
Petitioners,

v.

BRANDON W. OWENS,
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber") hereby moves this Court, pursuant to Rule 37.2, for leave to file the attached brief as *amicus curiae* in support of Petitioners in this case. No party opposes this motion. Petitioners have consented to the filing of the Chamber's *amicus* brief, and correspondence reflecting the consent of Petitioners has been lodged with the Clerk. Respondent does not consent to the filing of the brief but also has stated that he will not oppose this motion for leave to file the brief.

The Chamber is the world's largest business federation, representing 300,000 direct members and an underlying membership of more than three

million U.S. businesses and professional organizations. The Chamber is well positioned to assist the Court in its evaluation of the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community, and has participated as *amicus curiae* in numerous cases addressing jurisdictional issues.

The Chamber's members are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much-needed class-action reforms reflected in the Class Action Fairness Act of 2005 ("CAFA"). As a result, the organization has a wealth of experience in interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation.

The Chamber has a strong interest in seeking review of the Tenth Circuit's June 20, 2013 order denying appellate review of the district court's remand order to ensure that the rules governing removal of class actions to federal court are applied fairly and consistently and in keeping with Congress's intent to establish federal courts as the forum of choice for class actions of national importance. The Court of Appeals' refusal to hear this case paves the way for a requirement that defendants sued in state court in the Tenth Circuit amass voluminous evidence to support the filing of a notice of removal in federal court – and do so within thirty days of receiving the complaint. This approach ignores the text and history of the general federal removal statute and the policy concerns animating CAFA's

adoption. The Court's intervention is necessary to restore proper removal practice in the Tenth Circuit and ensure appropriate access to federal courts.

For the foregoing reasons, the motion of the Chamber to file a brief as *amicus curiae* in support of Petitioners should be granted.

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February 7, 2014

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners Dart Cherokee Basin Operating Company, LLC, *et al.*[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members operate in nearly every industry and business sector in the United States. These members have an interest in ensuring that the rules governing removal of class actions to federal court are applied fairly and consistently and in keeping with Congress's intent to establish federal courts

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioners, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Respondents, upon timely receipt of notice of the Chamber's intent to file this brief, have not consented to its filing.

as the forum of choice for class actions of national importance. The district court's ruling – and the Court of Appeals' refusal to grant review – establish a requirement that defendants sued in state court amass voluminous evidence *before* removing the case to federal court – and do so within thirty days of receiving the complaint. Such a ruling ignores the text and history of the general federal removal statute and the Class Action Fairness Act of 2005 ("CAFA"). This Court's intervention is necessary to restore proper removal practice in the Tenth Circuit and ensure appropriate access to federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant review and reverse the decision below to clarify that a defendant removing a suit to federal court is not required to proffer evidence with the notice of removal in order to prove jurisdictional facts. No federal court of appeals outside of the Tenth Circuit has engrafted such a requirement onto the federal rules. Nonetheless, the district court, relying on Tenth Circuit precedent, expressly adopted such a requirement in this case, and by declining to grant discretionary review, the Tenth Circuit effectively condoned the district court's approach. These courts erred for several reasons.

First, the district court decision imposes a burden that was never intended by the removal statute and that might never be corrected absent immediate review. By its terms, 28 U.S.C. § 1446(a) requires that a notice of removal contain only a "short and plain statement of the grounds for removal" – language that Congress expressly borrowed "from the jurisdictional pleading requirement" of Rule 8. This Court

clarified decades ago that the allegations of a complaint need not be supported by evidence filed contemporaneously with the complaint to satisfy Rule 8; there is no reason to read a contrary requirement into the identical language of the removal statute. Indeed, noting this similarity, five circuit courts in recent years have concluded that a removing defendant is not required to supplement its notice of removal with evidence – just as a plaintiff need not come forward with evidence to resist a motion to dismiss.

The decision below to part ways with the consensus of other federal circuits will impose significant and needless costs on defendants seeking to remove cases to federal court in the Tenth Circuit. The requirement that a removing defendant submit thorough evidence supporting its notice of removal – combined with § 1446's thirty-day limit to seek removal – forces defendants to face difficult decisions. Diligent attorneys would likely feel compelled to seek discovery and amass appropriate evidence to attach to the notice of removal, but in doing so, they would risk missing the thirty-day limit. Alternatively, a defendant could remove within thirty days and hope for leave to conduct discovery in federal court, but it would risk remand for failure to submit sufficient factual support. And because removal issues rarely reach an appellate court, this appeal presents the Court with a rare – and potentially final – opportunity to set Tenth Circuit removal jurisprudence back on the right course.

Second, the result below contravenes Congress's intent in enacting CAFA. The purpose of CAFA was to provide for expansive federal jurisdiction over class actions – and to make it easier to remove such

cases to federal court. Congress erected a presumption in favor of federal jurisdiction over interstate class actions to eliminate plaintiffs' jurisdictional gamesmanship. If allowed to stand, the district court's decision would significantly undercut Congress's expansion of federal jurisdiction over interstate class actions as well as its overarching goal of eliminating abusive plaintiff practices that evade federal jurisdiction.

Amicus respectfully submits that this case is a good candidate for summary reversal since it does not involve any "new or unanswered question of law"; rather, review is needed to "correct[] [the] lower court[s'] demonstrably erroneous application of federal law," *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999), and restore proper removal practice in the Tenth Circuit.

ARGUMENT

I. THE REFUSAL TO GRANT REVIEW EFFECTIVELY IMPOSES A NOVEL, UNDULY HIGH PLEADING BURDEN ON NOTICES OF REMOVAL.

The Court should first grant review because the result below ignores the text and intent of the removal statute, will impose unfair burdens on removing defendants, and advances a rule that may escape correction in future cases because remand rulings are rarely appealable.

A. Requiring Defendants To Submit Evidence With Notices Of Removal Contravenes The Text And Intent Of § 1446.

The district court held that where a complaint fails to demand a specific dollar amount satisfying

the amount-in-controversy prerequisite to federal diversity jurisdiction, "the amount in controversy must be affirmatively established on the face of [the] notice of removal." (Pet. App. 17a-18a.) In other words, the district court viewed removing defendants as "obligated to allege all necessary jurisdictional facts in the notice of removal" and attach evidence in support, "such as an economic analysis of the amount in controversy or settlement estimates." (*Id.* at 26a, 27a.)

But § 1446 enacts no such requirement. Instead, it mandates only that a removing defendant "file in the district court a notice of removal containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a).

Indeed, Congress amended § 1446 in 1988 to "simplify the 'pleading' requirements for removal" by changing the then-extant "requirement of a verified petition to a requirement that a notice of removal be signed pursuant to [Federal Rule of Civil Procedure] 11." H.R. Rep. No. 100-889, at 71-72 (1988). In so doing, Congress expressly rejected the tendency of "some courts to require detailed pleading" based on the "requirement that the petition of removal state the facts supporting removal." *Id.* It also made clear that the grounds for removal need only "be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by [Federal Rule of Civil Procedure] 8(a)." *Id.* Thus, just as this Court has stated that a plaintiff need not plead "'detailed factual allegations'" to satisfy Rule 8(a), *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted), a removing defendant should not be required to include a comprehensive recitation

of facts and supporting evidence in its notice of removal.

This conclusion is fortified by more recent amendments to § 1446. Three years ago, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA"), which added two paragraphs to subsection (c) of the statute "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011). One of these paragraphs states:

> If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—
>
> (A) the notice of removal may assert the amount in controversy if the initial pleading seeks—
>
> (i) nonmonetary relief; or
>
> (ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and
>
> (B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

28 U.S.C. § 1446(c)(2).[2]

In describing these provisions, Congress expressly declared that removing defendants "do not need to prove to a legal certainty that the amount in controversy requirement has been met." H.R. Rep. No. 112-10, at 16. "Rather, defendants may simply allege or assert that the jurisdictional threshold has been met." *Id.* Congress further explained that only in the "case of a dispute" does the defendant need to come forward with evidence supporting the allegations in the notice of removal, *id.*, which aligns the procedure for alleging and disputing jurisdictional facts in a notice of removal with the pleading practices governing complaints as described by this Court decades ago in *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936) ("*If [the] allegations of jurisdictional facts are challenged* by [the] adversary [of the party asserting jurisdiction] in any appropriate manner, he must support them by competent proof.") (emphasis added).

Given Congress's pellucid intent, it is unsurprising that five other circuits have held that the requirements of § 1446(c) mirror those of Rule 8(a) and thus do not require the presentation of proof of jurisdictional facts with the notice of removal. *See Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F. App'x 533, 534 (9th Cir. 2012); *Ellenburg v. Spartan*

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[2] Although the amendment applies only to § 1332(a), not CAFA's § 1332(d), "[t]here is no logical reason why [a court] should demand more from a CAFA defendant than other parties invoking federal jurisdiction," *Dart Cherokee Basin Operating Co. v. Owens*, 730 F.3d 1234, 1238 (10th Cir. 2013) (internal quotation marks and citation omitted) (Hartz, J., dissenting).

Motors Chassis, Inc., 519 F.3d 192, 199-200 (4th Cir. 2008); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1217 n.73 (11th Cir. 2007). The Fourth Circuit cogently summarized the requirements of § 1446 as follows:

> [J]ust as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that "[t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332," so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner.

Ellenburg, 519 F.3d at 200 (citations omitted).

For all of these reasons, the district court erred in holding that petitioner was obligated to submit proof of jurisdictional facts with the notice of removal, and the Court of Appeals should have granted review to correct that error and bring the Tenth Circuit into line with its fellow circuits. This Court should grant review, confirm that the prior consensus was correct, and reverse the remand decision.

B. The Tenth Circuit's Approach Imposes Severe, Far-Reaching Burdens on Defendants.

The wayward approach taken by the district court – and condoned by the Court of Appeals – also merits this Court's attention because of the considerable burden it will place on defendants that choose to exercise their right to remove cases to federal court.

If the district court's ruling is allowed to stand, a defendant may be unable to remove in any case where requisite jurisdictional facts are not alleged on the face of the complaint unless it can assemble proof of those facts in very short order.

Section 1446 mandates that a defendant file a notice of removal "within 30 days after the receipt of a copy of the initial pleading" or, "if the case stated by the initial pleading is not removable, within 30 days after receipt of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(1), (b)(3).

Interplay between the Tenth Circuit's demands and § 1446's time limits thus creates significant burdens on defendants. Because the district court held that a defendant must prove jurisdictional facts at the time of removal, defendants that lack proof of the facts of the plaintiff's case at the time the complaint is filed will feel compelled to conduct discovery in state court to develop the factual basis for their notice of removal.[3] Otherwise, they face a risk of remand for failure to buttress their notice of removal with adequate evidence. But under § 1446, they have only thirty days to do so. If they exceed the thirty-day limit in an effort to obtain support for their notice of removal, defendants face the specter of a federal court's remanding the action for untimely removal. *See, e.g., Addo v. Globe Life & Accident Ins.*

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[3] The district court decision leaves open the possibility that a defendant could seek discovery in federal court after removal, but such an uncertain possibility will provide little comfort to a defendant deciding whether it should first attempt to seek such discovery within the thirty-day limit in state court.

Co., 230 F.3d 759, 762 (5th Cir. 2000) (vacating district court's grant of summary judgment and ordering case remanded to state court where defendant failed to timely remove action and citing "purpose of the removal statute to encourage prompt resort to federal court when a defendant first learns that the plaintiff's demand exceeds the federal jurisdictional limit"). These limitations would likely prove fatal to removal in many jurisdictions absent leave to significantly expedite the discovery process contemplated by state procedural rules. *See, e.g.*, Kan. R. Civ. P. 60-226(b)(6)(C) (absent court direction, expert disclosures do not need to be made until 90 days before trial date).

Even in states that would permit it, the lightning round of jurisdictional discovery that is likely to follow from the Tenth Circuit's approach will significantly increase early litigation costs. That result is contrary to public policy, both because class actions already impose significant litigation costs, *cf. Bartnikowski v. NVR, Inc.*, 307 F. App'x 730, 741 (4th Cir. 2009) (Wilkinson, J., dissenting) (observing that courts should avoid adopting heightened requirements of proof of jurisdictional facts in class actions because such requirements would promote unnecessary discovery and thus "add[] more litigiousness to already litigious class action undertakings"), and because this Court has stressed the importance of minimizing discovery burdens prior to ruling on motions to dismiss, *see, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007).

The rule endorsed by the courts below also complicates the removal process by transforming a simple process of supplying notice of the grounds for removal into a potentially sprawling submission of

evidentiary proof on matters that may not even be contested. Such an outcome is contrary to this Court's prior teaching that simplicity "is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (also noting that "[s]imple jurisdictional rules promote greater predictability," which "is valuable to corporations making business and investment decisions"). For these reasons, too, the Court should grant the petition and reverse.

C. Review Is Needed Because This Issue Is Unlikely to Arise Again on Appeal.

The Court should also grant review in this case because it may not have another opportunity to correct the lower courts' rulings.

As an initial matter, the Tenth Circuit's refusal to review the district court's decision will, in practice, make that decision the law of the Circuit, and defendants' efforts to comply with its onerous burdens will likely prevent the issue from arising again. As the dissent from denial of en banc review observed, "any diligent attorney" going forward will likely "submit to the evidentiary burden rather than take a chance on remand to state court." (Pet. App. 3a.) This is particularly so in light of the district courts' authority to impose sanctions for removals that lack an "objectively reasonable basis." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); *see also generally* 28 U.S.C. § 1447(c). Unless a future lawyer risks removing a case without evidentiary support, there will be no way to correct the district court's misinterpretation of the removal statute.

In addition, procedural hurdles stand as an independent obstacle to appellate review. Because a party generally may not appeal an order remanding a

case to state court, 28 U.S.C. § 1447(d), only a future class action would provide an opportunity to present the question for appellate review. *Id.* § 1453(c)(1); *see also Tmesys, Inc. v. Eufaula Drugs, Inc.*, 462 F.3d 1317, 1318-19 (11th Cir. 2006) ("Under 28 U.S.C. § 1447(d) we are generally deprived of appellate jurisdiction over remand orders. As to qualifying cases 'commenced' on the day of or after CAFA's enactment, however, CAFA provides us discretionary appellate jurisdiction to review such orders."). As some commentators have noted, the rarity of appellate review with respect to removal issues can lead to stultification of removal doctrine. *See, e.g.*, James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 Alb. L. Rev. 1013, 1071 n.291 (2006) (observing that procedural roadblocks to appellate review of remand orders explains "why there is not a more clear resolution of the issue of the appropriate standards [of fraudulent joinder], at least from the appellate courts," even though fraudulent joinder has "relatively ancient origins").

In short, this appeal gives the Court a unique and important opportunity to clarify the burdens on a defendant filing a notice of removal. It should take that opportunity and reverse.

II. THE TENTH CIRCUIT'S APPROACH IGNORES CAFA'S SWEEPING REMEDIAL AIM.

The Court of Appeals' failure to grant review is particularly disturbing because the district court's ruling undermines CAFA's goals of creating expansive federal jurisdiction and making removal easier. It also promotes the sort of jurisdictional gamesman-

ship that Congress sought to eliminate when it enacted CAFA.

First, the approach below is at odds with Congress's intent that federal jurisdiction should be expanded over interstate class actions under CAFA. Congress enacted CAFA to curb "[a]buses in class actions," which "undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 5 (Feb. 18, 2005). Congress found that a "key reason" for "the numerous problems with our current class action system" was that "most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations)." S. Rep. No. 109-14, at 4 (2005). Concluding that "the current diversity and removal standards as applied in interstate class actions are thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction," *id.* at 6, Congress declared that the "overall intent" of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications," *id.* at 35. As one of CAFA's leading sponsors squarely put it, if "a Federal court is uncertain [that] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec. H726 (statement of Rep. Jim Sensenbrenner).

Many courts and commentators alike have recognized this strong presumption in favor of federal jurisdiction, grasping that CAFA brought about "wholesale changes in the law" with "broad ramifications." *See, e.g.*, H. Hunter Twiford, III *et al.*, *CAFA's*

New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, With the Burden of Proof Assigned to the Party Opposing Jurisdiction, 25 Miss. C. L. Rev. 7, 7 (2005). As the Eighth Circuit has explained, "[t]he language and structure of CAFA indicate that Congress contemplated broad federal court jurisdiction with only narrow exceptions." *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (internal quotation marks, citation and alterations omitted); *see also* Sara S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1641, 1643 (2006) ("CAFA expanded federal jurisdiction in a major way" and "represents the largest expansion of federal jurisdiction in recent memory"); Twiford, *supra* at 60 ("[CAFA's] fundamental changes greatly liberalize and invite federal court jurisdiction over class actions "). It follows that CAFA "commensurately expands defendants' opportunities to remove class actions," making removal easier – not more difficult. Vance, *supra* at 1630; *see also Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (assessment of removal under CAFA requires careful attention to the statute's "primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'") (citation omitted).

The lower courts ignored CAFA's goal of making removal easier, instead endorsing a "strong presumption against removal" of class actions. *See Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR-JPO, 2013 WL 2237740, at *5 (D. Kan. May 21, 2013).[4] After all, there was no real dispute

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[4] The district court's allusion to the need to "narrowly construe[] removal statutes" and resolve "all doubts in favor

that the case met CAFA's $5 million amount-in-controversy requirement. (*See* Pl.'s Reply at Pet. App. 92a (challenging removal only on the ground that Petitioners' submission of evidence not attached to its notice of removal was a "belated attempt[] to bolster a deficient notice of removal").) Yet, while granting that Petitioners had potentially submitted sufficient evidence to prove by a preponderance of the evidence that the prerequisites to removal had been satisfied, the district court nevertheless held that petitioners "were obligated to allege all necessary jurisdictional facts in the notice of removal." *Owens*, 2013 WL 2237740, at *5. By imposing such a burden on de-

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of remand," *Owens*, 2013 WL 2237740, at *1, mistakenly imports inapposite precedent to the CAFA context. Whatever the general rule applicable to removal statutes, the removal provisions of CAFA should not be narrowly construed. To be sure, "[t]he burden of persuasion for establishing diversity jurisdiction . . . remains on the party asserting it." *Hertz*, 559 U.S. at 96. But congressional intent determines the appropriate mode of interpreting a removal statute. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003). Hence, while strictly construing a removal statute is appropriate when that restrained approach dovetails with the intent of the enacting Congress, *see, e.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (relying on the "Congressional purpose to restrict the jurisdiction of the federal courts on removal" to justify strictly construing the general removal statute), "an expansive interpretation of the nature of the right to remove" should accompany a statute evincing an "unusually strong preference for adjudication of [certain claims] in the federal court system," *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994); *see also Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006). Because Congress indicated an "unusually strong preference" for adjudicating class actions in federal court, CAFA's removal provisions should receive "an expansive interpretation." *See Tex. E. Transmission Corp.*, 15 F.3d at 1243.

fendants – one that is likely to prove quite onerous in light of the short time afforded to remove a case, as discussed above – the lower courts have undermined Congress's strong presumption in favor of federal jurisdiction over interstate class actions by making it more difficult for defendants to remove these cases to federal court.

If allowed to stand, the district court's ruling will also have the effect of encouraging gamesmanship in class-action litigation, in further contravention of congressional intent. Congress's expansion of federal jurisdiction over interstate class actions was directed in large part at reversing then-current law that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10 (criticizing plaintiffs' jurisdictional gamesmanship). This Court recently recognized as much by rejecting one previously common strategic effort used by plaintiffs' lawyers to evade CAFA jurisdiction: waiving class claims in excess of $5 million through non-binding stipulations. *See Standard Fire*, 133 S. Ct. at 1350 (explaining that allowing plaintiffs' lawyers to subdivide "a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations would squarely conflict with the statute's objective"); *see also Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 977, 980-81 (9th Cir. 2013) (principle that plaintiff is the "master of her complaint" is "clearly irreconcilable with the Supreme Court's reasoning in *Standard Fire*" because that ruling rejects manipulative efforts to circumvent CAFA jurisdiction).

The Tenth Circuit's renegade approach invites another type of jurisdictional gamesmanship in the class action arena as well: the omission of key factual allegations from a state court class action complaint in order to evade CAFA jurisdiction. Under the holding reached below, a putative class action plaintiff seeking to evade federal jurisdiction could elect to include only vague information about damages in her state court complaint, placing the burden on the defendant to discover enough factual support to establish the requisite $5 million amount in controversy within thirty days. Such a result would complicate or prevent timely removal of interstate class actions, recreating precisely the sort of jurisdictional gamesmanship and artful pleading that Congress sought to extinguish when it enacted CAFA. Granting certiorari is therefore necessary to ensure that lower courts do not "sanction devices intended to prevent a removal to a Federal court where one has that right." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the Court should grant the petition for a writ of certiorari and summarily reverse.

Respectfully submitted,

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February 7, 2014

PETITIONER'S BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, AND CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

A defendant seeking to remove a case to federal court must file a notice of removal containing "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Consistent with that statutory pleading requirement, seven circuits require a notice of removal to contain only *allegations* of the jurisdictional facts; they do not require the notice to include *evidence* supporting federal jurisdiction. District courts in those circuits may consider evidence supporting removal even if submitted later in response to a motion to remand.

Here, in a clean break from § 1446(a)'s plain language, the Tenth Circuit let stand a district court order remanding a class action to state court even though the district court refused to consider evidence establishing federal jurisdiction under the Class Action Fairness Act (CAFA) simply because the evidence was not attached to the notice of removal. (The evidence, which was not disputed, came later in response to the motion to remand.)

The question presented is:

Must a defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is including the required "short and plain statement of the grounds for removal" enough?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption includes the names of all parties to the proceedings below.

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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OPINIONS BELOW

The district court's remand order is unpublished but is electronically available at 2013 WL 2237740 and reproduced at Pet. App. 15a. The Tenth Circuit's order denying permission to appeal is unpublished and reproduced at Pet. App. 13a. The Tenth Circuit's order denying rehearing en banc is reported at 730 F.3d 1234 and reproduced at Pet. App. 1a.

JURISDICTION

On June 20, 2013, the Tenth Circuit denied permission to appeal the district court's remand order. Pet. App. 13a. On September 17, 2013, it denied rehearing en banc. Pet. App. 1a. Petitioners filed their petition for a writ of certiorari on December 13, 2013; this Court granted the petition on April 7, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1). *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Hohn v. United States*, 524 U.S. 236, 242 (1998).

STATUTORY PROVISIONS INVOLVED

The statute governing removal procedure (28 U.S.C. § 1446) provides as follows:

> (a) Generally.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Other relevant statutory provisions are reproduced in the Statutory Appendix.

STATEMENT

A defendant seeking to remove a case to federal court must file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a)." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008).[1]

Contrary to § 1446(a)'s pleading standard, the Tenth Circuit requires a notice of removal to include evidence of the grounds for removal, not merely allegations of those grounds. District courts in the circuit are constrained to ignore evidence of jurisdictional facts if the evidence is not included in the notice of removal.

1. Respondent Brandon Owens filed a putative class action in Kansas state court against Petitioners Dart Cherokee Basin Operating Company, LLC and Cherokee Basin Pipeline, LLC. Owens seeks royalty payments under certain oil and gas leases. He did not specify a damages amount in his complaint and instead included a generic prayer for "damages [that

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[1] Under Federal Rule of Civil Procedure 8(a),

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

he and putative class members] have suffered and will suffer up to the time of trial." Pet. App. 34a-35a.

Under CAFA, a class action is removable to federal court if there is minimal diversity, at least 100 putative class members, and at least $5 million in controversy. 28 U.S.C. § 1332(d); *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011) (CAFA "enable[s] defendants to remove to federal court any sizable class action involving minimal diversity"). This case satisfies CAFA's jurisdictional requirements, so Petitioners removed it to federal court, filing a Notice of Removal and attaching the required process, pleadings, and orders served on them. Pet. App. 37a.

Petitioners' Notice of Removal contained the required "short and plain statement of the grounds for removal": Petitioners alleged that they and at least some putative class members (including Owens) are citizens of different States; that the putative class includes approximately 400 people; that the putative class members hold royalty interests in approximately 700 oil and gas wells; that the case involves a dispute about those wells' production since January 1, 2002; that Owens seeks three types of damages; and that—given the nature of the claims asserted, the putative class's size, and the proposed class period's length—the amount in controversy exceeds $8.2 million. Pet. App. 39a-40a. Those allegations would satisfy Rule 8's pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Pet. App. 5a (Hartz, J., dissenting) ("Allegations of the amount in controversy are ordinarily much more abbreviated.").

Owens moved to remand the case to state court. He did not dispute the jurisdictional allegations but

argued that the Notice was "deficient as a matter of law" because it contained no evidence showing that the case satisfies CAFA's $5 million amount-in-controversy requirement. Pet. App. 53a.

In response, Petitioners submitted a declaration from one of Dart's corporate officers. The declaration included Petitioners' updated damages calculations and other facts that Petitioners discovered after removal—including Owens's assertion in a mediation statement that the amount in controversy is "in excess of $21.5 million." Pet. App. 75a-80a.

Owens did not dispute the facts in Petitioners' declaration and "offer[ed] no affidavit, declaration, or other evidence challenging [Petitioners'] calculation." Pet. App. 21a. Instead, Owens argued that the Notice of Removal could "not be cured" by submitting evidence in response to a remand motion. Pet. App. 21a, 91a-92a.

2. The district court granted Owens's motion and remanded the case to state court. Pet. App. 15a. Believing that Petitioners were required to prove CAFA jurisdiction in the Notice of Removal, the court noted that Petitioners "fail[ed] to incorporate any evidence supporting [the amount-in-controversy] calculation in the Notice of Removal" and held that "in the absence of such evidence, the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million." Pet. App. 25a-26a. The court refused to consider Petitioners' declaration because, in its view, the "Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." *Id.* at 26a &

n.37 (citing *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *Okla. Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F. App'x 775 (10th Cir. 2005)).

3. Petitioners sought permission to appeal the district court's remand order (*see* 28 U.S.C. § 1453(c)), but a divided panel of the Tenth Circuit denied the petition. Pet. App. 13a. Petitioners then sought rehearing en banc, but the Tenth Circuit denied that petition in a split 4-to-4 vote. Pet. App. 1a.

Judge Hartz (joined by Judges Kelly, Tymkovich, and Phillips) dissented from the denial of rehearing en banc. In Judge Hartz's view, the district court's decision "imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court." Pet. App. 3a; *see also id.* at 2a (Hartz, J., dissenting) ("[This Court] has let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.").

Emphasizing that § 1446(a) "parrots Rule 8," Judge Hartz explained that "there should be no dispute that Petitioners' notice of removal was adequate." Pet. App. 4a. He pointed to this Court's decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), where the Court assumed that it was enough for a party seeking removal to allege (not prove) the jurisdictional facts in the notice of removal. Pet. App. 6a-7a (quoting *Hertz*, 559 U.S. at 96-97 ("When challenged on *allegations of jurisdictional facts,* the parties must support their allegations by competent proof.") (emphasis added)).

Judge Hartz underscored that § 1446(a) requires allegations, not evidence, of jurisdiction:

> The burden imposed by the district court on Petitioners was excessive and unprecedented. The notice of removal adequately alleged jurisdiction, Petitioners' evidence of jurisdiction was more than adequate, and there was no basis for requiring Petitioners to submit that evidence before the adequacy of the notice was challenged.
>
> * * *
>
> In short, I think it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation.

Pet. App. 7a-8a, 11a.

SUMMARY OF ARGUMENT

I. A defendant seeking to remove a case to federal court must file a notice of removal "containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). By its plain terms, the statute establishes a pleading standard: A notice of removal must contain allegations of the grounds for removal, not evidence of those grounds.

A. Section § 1446(a)'s call for a "short and plain statement of the grounds for removal" mirrors Rule 8's pleading standard. It is enough for a notice of removal to contain allegations of the grounds for removal; evidence can come later (including in response to a motion to remand). Seven circuits have held or assumed as much.

B. Recent additions to § 1446(c)(2) confirm that the notice of removal must include allegations (not proof) of the grounds for federal jurisdiction. Those new provisions—which apply when the amount in controversy is uncertain from the face of the complaint—make clear that a defendant must present evidence supporting federal jurisdiction only after a challenge to the jurisdictional allegations in the notice of removal.

C. Section 1446 tracks this Court's long-standing approach to jurisdictional challenges. Since at least *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the Court has recognized that a party does not need to present evidence supporting jurisdictional allegations until those allegations are challenged.

II. The Tenth Circuit's demand for evidence in the notice of removal significantly burdens removing defendants, complicates the removal process, and conflicts with CAFA's objectives.

A. Section 1446(a) imposes a straightforward pleading burden—one instantly familiar to most litigators. The Tenth Circuit's approach saddles defendants with an evidentiary burden that has no basis in the statute. A defendant in the Tenth Circuit who lacks proof of jurisdictional facts cannot remove a case without first gathering that evidence to include in the notice of removal. That investigation might require the defendant to search its own records and may even lead the defendant to seek discovery in state court—often under the belief (perhaps correct, perhaps not) that § 1446(b)(1)'s 30-day removal window is closing. Either way, the Tenth Circuit's approach to removal drives up litigation costs early in litigation, forcing defendants to gather evidence supporting jurisdictional allegations that may never be disputed.

B. The Tenth Circuit's atextual approach also unnecessarily complicates the removal process. It jettisons § 1446(a)'s requirement of "a short and plain statement of the grounds for removal" in favor of a complicated approach that can lead to sprawling evidentiary submissions on jurisdictional allegations that may never be challenged. Simplicity is a virtue in jurisdictional matters (*see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)), including in jurisdictional pleading. The Tenth Circuit's approach is the opposite of simple.

C. The Tenth Circuit's demand for evidence in the notice of removal also runs counter to CAFA's objectives. Congress enacted CAFA to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 133 S. Ct. at 1350 (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5). The Tenth Circuit's rule thwarts CAFA's objectives by keeping class actions out of federal court on a technicality that has no basis in any statute.

Through CAFA, Congress also sought to change then-existing law that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions." S. Rep. No. 109-14, at 10 (2005). Far from discouraging gamesmanship, the Tenth Circuit's approach invites it. It encourages a state-court plaintiff to try to avoid federal court by including ambiguous allegations about damages, placing the burden on the defendant to marshal evidence supporting removal (even when the jurisdictional facts are not challenged).

"[T]here should be no dispute that Petitioners' notice of removal was adequate." Pet. App. 4a (Hartz,

J., dissenting). This Court should reverse the district court's order remanding the case to state court.

ARGUMENT

I. THE REMOVAL STATUTE REQUIRES A NOTICE OF REMOVAL TO CONTAIN "A SHORT AND PLAIN STATEMENT OF THE GROUNDS FOR REMOVAL," NOT EVIDENCE OF JURISDICTIONAL FACTS.

A defendant seeking removal to federal court must file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a). On its face, § 1446(a) establishes a pleading standard, not a demand for proof.

A. Section 1446(a)'s call for "a short and plain statement of the grounds for removal" tracks Rule 8's pleading standard.

In interpreting a statute, this Court "always turn[s] first to one, cardinal canon before all others": the plain-meaning rule. *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992). The Court presumes that "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted). "When the words of a statute are unambiguous," the "first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank,* 503 U.S. at

254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

This Court's analysis should start and stop with § 1446(a)'s plain language. The statute requires a notice of removal to contain "a short and plain statement of the grounds for removal." That is a pleading standard. It requires allegations, not evidence. If Congress had intended to require evidence of jurisdiction in the notice of removal, it would have said so. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.").

Section 1446(a)'s pleading standard is a familiar one. The "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a)." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3733 (4th ed. 2009) ("Section 1446(a) requires only that the grounds for removal be stated in 'a short and plain statement'—terms borrowed from the pleading requirement set forth in Federal Rule of Civil Procedure 8(a)."); 16 James Wm. Moore, *Moore's Federal Practice* § 107.30[2][a][i] (3d ed. 2013) ("The 'short and plain statement' requirement mirrors the language of the general pleading rules.").[2]

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[2] Rule 8 and its "short and plain statement" requirement first came into force in 1938. From the very beginning, courts interpreted Rule 8(a)'s call for a "short and plain statement of the grounds upon which the court's jurisdiction depends" to require only allegations. *See, e.g., Barnhart v. W. Md. Ry. Co.*, 128 F.2d 709, 710 (4th Cir. 1942). Congress enacted 28 U.S.C. § 1446(a) in

As it reads today, § 1446(a) reflects Congress's efforts to make removal pleading easier than it was under the old version of the statute. Before 1988, § 1446(a) required a defendant seeking removal to file a "verified petition containing a short and plain statement of the facts which entitle him or them to removal." 28 U.S.C. § 1446(a) (1982). In 1988, Congress amended the statute to "simplify the 'pleading' requirements for removal" by changing the then-existing "requirement of a verified petition to a requirement that a notice of removal be signed pursuant to Civil Rule 11." H.R. Rep. No. 100-889, at 71 (1988). In doing so, Congress rejected the tendency of "some courts to require detailed pleading" based on the "requirement that the petition of removal state the facts supporting removal." *Id.*[3] The current version of § 1446(a)—which drops the old requirement of a "verified petition" and makes no mention of the "facts" supporting removal—"requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish [sic] by civil rule 8(a)." H.R. Rep. No. 100-889, at 71-72.

Consistent with § 1446(a)'s plain language, seven circuits have held or assumed that it is enough to

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1948, borrowing the "short and plain statement" language from Rule 8.

[3] Even under the old version of § 1446(a), courts recognized that the statute's call for a "short and plain statement" established a pleading standard. *See, e.g.*, *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965) (interpreting the old version of § 1446(a): "[W]e have no doubt that the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings "), *aff'd*, 384 U.S. 780 (1966); *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317 (9th Cir. 1969) (treating the old version of § 1446(a) as a pleading standard).

allege the grounds for federal jurisdiction in the notice of removal. Those courts do not require the defendant to attach evidence to the notice of removal; evidence can come later, including in response to a motion to remand. *See Ellenburg*, 519 F.3d at 194; *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 205 (2d Cir. 2001); *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F. App'x 533, 534-35 (9th Cir. 2012); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 774 n.29 (11th Cir. 2010). *Cf.* Pet. App. 3a (Hartz, J., dissenting) (explaining that the decision below "imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court"). Section 1446(a) admits of no other interpretation.

B. Other provisions in § 1446 confirm that the statute requires allegations (not evidence) in the notice of removal.

"Short and plain statement" means short and plain statement. This Court does not need to venture past those words to conclude that a notice of removal must contain allegations (not evidence) of the grounds for removal. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (internal quotation marks omitted). But other parts of the statute confirm that the pleading standard in § 1446(a) is no illusion. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("a statute is to be read as a whole"). Like § 1446(a),

those other provisions make plain that a defendant may simply allege the grounds for removal in the notice of removal; evidence can come later in response to a challenge to those allegations.

Three years ago, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011. The 2011 Act added two paragraphs to § 1446(c) "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011).

Section 1446(c)(2)(A) provides that, in certain cases when the amount in controversy is unclear from the complaint, the "notice of removal may *assert* the amount in controversy." 28 U.S.C. § 1446(c)(2)(A) (emphasis added). The statute says "assert" the amount in controversy, not "prove" or "provide evidence of" the amount in controversy. Section 1446(c)(2)(B) provides that "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." *Id.* § 1446(c)(2)(B).[4]

Read together, those provisions confirm that a defendant seeking removal may allege the grounds for federal jurisdiction in the notice of removal and can

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[4] Although 28 U.S.C. § 1446(c)(2) applies only to removals under the general diversity statute (28 U.S.C. § 1332(a)), "'[t]here is no logical reason . . . [to] demand more from a CAFA defendant than other parties invoking federal jurisdiction.'" Pet. App. 11a (Hartz, J., dissenting) (quoting *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012)); *see also, e.g.*, *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 977 (9th Cir. 2013) (holding that the preponderance standard applies under CAFA when there is a challenge to jurisdictional facts).

wait for a challenge to those allegations to present evidence of jurisdiction. As the House Judiciary Committee Report behind the statute reveals, that is how Congress conceives of the removal process:

> [D]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants *may simply allege or assert that the jurisdictional threshold has been met*. Discovery may be taken with regard to that question. *In case of a dispute*, the district court must make findings of jurisdictional fact to which the preponderance standard applies.

H.R. Rep. No. 112-10, at 16 (emphasis added). Of course, a dispute about jurisdictional allegations in a notice of removal cannot arise until *after* a defendant files the notice.[5]

In many cases, allegations of jurisdictional facts go unchallenged, but in those cases where the plaintiff moves to remand or the federal district court questions the jurisdictional allegations, the need for evidence arises only after the challenge. *See* 16 Moore, § 107.30[2][a][i] ("At any rate, if the jurisdictional allegations are challenged, whether by a party or by the court, the removing party must demonstrate that removal jurisdiction is proper."). At that point, the defendant bears the burden of establishing federal

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[5] That is precisely how things played out in *Standard Fire*. There, Standard Fire filed a notice of removal containing only allegations of the jurisdictional facts. *See* Notice of Removal, *Knowles v. Standard Fire Ins. Co.*, No. 4:11-cv-04044-PKH (W.D. Ark. May 18, 2011), ECF No. 1. When the named plaintiff moved to remand, Standard Fire submitted a declaration supporting its jurisdictional allegations. *See* Affidavit of Brian N. Harton, *id.* (July 5, 2011), ECF No. 9-9.

jurisdiction (*see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)), relying on whatever evidence it can muster. But just as a federal plaintiff does not have to submit evidence of jurisdiction along with a complaint, a removing defendant does not have to submit evidence along with a notice of removal. *Cf. Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11th Cir. 2000) ("there is no good reason to keep a district court from eliciting or reviewing evidence outside the removal petition").[6]

C. This Court has consistently held that a defendant does not need to present evidence supporting jurisdictional allegations until the allegations are challenged.

It should come as no surprise that Congress established a pleading standard for the notice of removal and contemplated a defendant submitting evidence of jurisdictional facts only after a challenge: That has long been this Court's approach to jurisdictional disputes.

Take *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), for instance. There, the Court explained that a removing defendant does not need to present

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[6] Even in the Tenth Circuit (as in other circuits), a defendant who fails to include the required "process, pleadings, and orders" can cure that "minor procedural defect" by supplementing the notice of removal "either before or after expiration of the thirty-day removal period." *Countryman v. Farmers Ins. Exch.*, 639 F.3d 1270, 1272-73 (10th Cir. 2011); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3733 (4th ed. 2009). And yet the Tenth Circuit forbids a defendant from "curing" a "defect" (the purported failure to include evidence in the notice of removal) that has no basis in the statute.

evidence of jurisdictional facts until after jurisdictional allegations are challenged:

> If a removal is effected, the plaintiff may, by a motion to remand, plea, or answer, take issue with the statements in the petition [for removal]. If he does, the issues so arising must be heard and determined by the District Court, and at the hearing the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding. *But if the plaintiff does not take issue with what is stated in the petition [for removal], he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it.*

Id. at 97-98 (emphasis added) (citations omitted). The Court later endorsed the same approach in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936):

> *If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner*, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.

Id. at 189 (emphasis added).

The Court recently applied *McNutt*'s teaching in the CAFA context, explaining that "[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (citing *McNutt*, 298 U.S. at 189). Evidence is required after a challenge, not before—and certainly not in the notice

of removal, which requires only allegations of the grounds for removal.

* * *

Petitioners' Notice of Removal satisfied § 1446(a)'s call for a "short and plain statement of the grounds for removal." The Notice included detailed allegations of the facts supporting CAFA jurisdiction—allegations that would satisfy Rule 8's pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Pet. App. 4a (Hartz, J., dissenting) ("[T]here should be no dispute that Petitioners' notice of removal was adequate."). On top of that, Petitioners submitted an unchallenged declaration establishing CAFA jurisdiction. Pet. App. 20a-21a.

But the case now sits in state court for the simple fact that Petitioners did not attach the declaration to the Notice of Removal. No one disputes that the declaration establishes federal jurisdiction, but the district court ignored the declaration because it thought that Tenth Circuit precedent required it to assess jurisdiction based only on the complaint and the Notice of Removal. The Tenth Circuit's approach betrays § 1446's plain language and this Court's longstanding approach to jurisdictional challenges.

II. THE TENTH CIRCUIT'S APPROACH PLACES A SIGNIFICANT BURDEN ON REMOVING DEFENDANTS, IS UNNECESSARILY COMPLEX, AND RUNS COUNTER TO CAFA'S OBJECTIVES.

The Tenth Circuit's demand for evidence in the notice of removal flouts § 1446's plain language. It is also bad policy, for at least three reasons.

A. The Tenth Circuit's demand for evidence in the notice of removal places a significant burden on defendants early in litigation.

Section 1446(a)'s "short and plain statement" language imposes a straightforward pleading requirement on defendants—one immediately familiar to those who practice in federal court. But the Tenth Circuit's contrary approach places a significant burden on removing defendants, requiring them to marshal proof of jurisdictional facts even before a challenge to jurisdictional allegations—and in many cases to do so within the brief 30-day removal window.

Because a defendant in the Tenth Circuit must prove the jurisdictional facts at the time of removal, defendants who lack proof of those facts when the state-court complaint is filed must search their own records or perhaps even consider seeking discovery in state court to develop the required proof. Otherwise, they could face remand for failing to support the notice of removal with evidence. That investigation takes time and money—all to support jurisdictional allegations that may never be disputed. The Tenth Circuit's departure from § 1446(a)'s pleading standard drives up early-stage litigation costs—a result at odds with this Court's efforts to curb discovery costs in the nascent stages of disputes. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007) (citing reports and commentary bemoaning rising discovery costs); Thomas E. Willging et al., Fed. Judicial Ctr., *Discovery and Disclosure Practice, Problems, and Proposals for Change* (1997) (studying increases in discovery costs).

What is more, in many (if not most) cases, defendants will feel compelled to gather the necessary evidence within 30 days from the filing of the state-

court complaint because of concern over missing the 30-day removal window. Under 28 U.S.C. §§ 1446(b)(1) and (b)(3), a defendant must file a notice of removal "within 30 days after the receipt of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based" or "if the case stated by the initial pleading is not removable, within 30 days after receipt of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Missing the removal deadline can result in remand. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995).

In some cases, concern over the initial 30-day window may be unwarranted: "Every circuit that has addressed the question" has held that the "30-day removal clock does not begin to run until the defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present." *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013). But there is no guarantee that the district court will agree with the defendant about whether the removal clock is ticking. And the price of a mistaken judgment on that score is too much to pay: Remand orders are *not* appealable outside the CAFA context (28 U.S.C. § 1447(d)) and not *automatically* appealable in the CAFA context. *Id.* § 1453(c)(1).

B. Requiring evidence in the notice of removal trades the simplicity of § 1446(a)'s pleading burden for the unnecessary complexity of jurisdictional discovery.

Requiring evidence of jurisdiction in the notice of removal also complicates the removal process. The requirements for federal jurisdiction are straightforward. *See* 28 U.S.C. §§ 1331, 1332. So is § 1446(a)'s call for a "short and plain statement of the grounds for removal." If "administrative simplicity is a major virtue in a jurisdictional statute" (*Hertz*, 559 U.S. at 94),[7] then it surely is a virtue in jurisdictional pleading.

The Tenth Circuit's approach to § 1446 is not simple. It's unnecessarily complex. The court of appeals has eschewed § 1446(a)'s simple pleading requirement in favor of a complex process that often leads to extensive, front-loaded discovery and sprawling submissions of evidence. Its approach "complicate[s] a case, eating up time and money" as the defendant works to prove jurisdictional allegations that might never be disputed. *Hertz*, 559 U.S. at 94.

C. The Tenth Circuit's approach also runs counter to CAFA's objectives.

Requiring removing defendants to attach evidence to the notice of removal would be bad enough in the

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[7] *See also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("[s]imple jurisdictional rules . . . promote greater predictability," which "is valuable to corporations making business and investment decisions"); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) ("[W]hen judges must decide jurisdictional matters, simplicity is a virtue.").

mine run of cases, but it is indefensible in the class context, where Congress has relaxed the standards for removing a case to federal court.[8]

CAFA "enable[s] defendants to remove to federal court any sizable class action involving minimal diversity." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011); *see also Standard Fire*, 133 S. Ct. at 1350 (CAFA's "primary objective" is to "ensur[e] Federal court consideration of interstate cases of national importance") (internal quotation marks omitted); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."). "Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." S. Rep. No. 109-14, at 43; *see also id.* at 35 (CAFA's "overall intent" "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications").

The Tenth Circuit's approach undermines CAFA's objectives by keeping large-scale class actions out of

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[8] The district court below ignored CAFA's goal of making removal easier and instead applied a so-called "strong presumption against removal." Pet. App. 28a. No such presumption exists in any removal context (*see Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003)), and certainly not under CAFA. *See* S. Rep. No. 109-14, at 42 (2005) ("And if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case.").

In all events, no presumption could change § 1446(a)'s plain meaning. "Short and plain statement" means what it says.

federal court based on a technicality that has no basis in the removal statute. Even though the district court recognized that Petitioners' declaration likely established CAFA jurisdiction (*see* Pet. App. 20a-21a), it ignored the declaration simply because Petitioners did not attach it to the Notice of Removal. That additional procedural obstacle—crafted out of thin air—frustrates Congress's intent by making it more difficult to remove interstate class actions to federal court.

That is not all. The Tenth Circuit's rule also contravenes Congress's intent to reverse then-existing law that "enabl[ed] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10. In *Standard Fire*, this Court cited that congressional objective in rejecting a named plaintiff's efforts to game CAFA's jurisdictional requirements. *See* 133 S. Ct. at 1350; *see also Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008) ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction.").

The Tenth Circuit's approach to removal does not discourage gamesmanship. It invites it. It encourages plaintiffs to omit allegations touching on jurisdictional requirements in an effort to evade federal court. A plaintiff seeking to remain in state court can include vague allegations about damages, forcing the defendant to gather enough evidence to support removal under CAFA. By giving plaintiffs leverage to complicate the removal process (or perhaps even to thwart removal), the Tenth Circuit's approach opens the door for the type of jurisdictional game-playing that Congress sought to end.

CONCLUSION

For all these reasons, this Court should reverse the district court's order remanding this case to state court.

Respectfully submitted,

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APPENDIX

APPENDIX

The statute governing removal procedure (28 U.S.C. § 1446) provides as follows:

> (b) Requirements; generally.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
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> * * *
>
> (3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.
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> * * *
>
> (c) Requirements; removal based on diversity of citizenship.—
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> * * *
>
> (2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

CAFA's removal provision (28 U.S.C. § 1453) provides as follows:

(b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

CAFA's jurisdictional provision (28 U.S.C. § 1332(d)) provides as follows:

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

* * *

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

* * *

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

RESPONDENT'S BRIEF

No. 13-719

In The
Supreme Court of the United States

DART CHEROKEE BASIN
OPERATING COMPANY, LLC,
and CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS,
On behalf of himself and all others similarly situated,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

When the state court petition was "not removable" on its face because it stated no amount in controversy and Petitioners wanted to remove the case anyway, was the district court correct in requiring Petitioners – who admittedly possessed all of the evidence to prove the amount in controversy at the time of removal – to present at least some evidence that the statutorily required amount in controversy was met with its notice of removal, or could Petitioners invoke the federal court machinery (pleadings, scheduling, affirmative disclosures, protective orders, and discovery) with only a conclusory statement of the amount in controversy and offer evidence later?

CORPORATE DISCLOSURE STATEMENT

Brandon Owens is not a corporation.

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STATEMENT OF THE CASE

The state court class action petition did not state an amount in controversy because only Dart possessed the royalty owner paydecks and confidential third party gas contracts needed to calculate class-wide damages. Pet. App. 16a, 20a, 27a.[1] Dart removed, citing diversity jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") as its ground for removal. *Id.* 38a. Its notice of removal included only a conclusory statement that the amount in controversy "is in excess of $8.2 million." *Id.* 40a. The notice of removal offered no evidence to support that naked allegation of the jurisdictional amount. Pet. App. 37a-42a. Dart answered and moved to dismiss, and within 10 days of removal, Owens moved to remand. Pet. App. 43a. Dart suggested mediation and the following month began providing some damages information to Owens. Months later, after the mediation failed, Dart filed an eleven-paragraph declaration that showed Dart had evidence of the amount in controversy available to it at the time of removal. Pet. App. 16a, 20a, 24a, 27a.

The district court remanded, concluding that "the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million." *Id.* 26a. The Tenth Circuit denied Dart's petition for permission to appeal the remand

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[1] "Dart" refers to both Petitioners Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline, LLC.

order and denied Dart's petition for rehearing en banc. Pet. App. 1a, 13a. Dart asks this Court to rescue them from their failure to timely offer any evidence of jurisdictional facts.

With its almost singular focus on 28 U.S.C. § 1446(a), Dart conveniently ignores subsection (c) of the same statute which specifies the procedural requirements for both alleging and proving the amount in controversy. Section 1446(a) requires the notice of removal contain "a short and plain statement of the grounds for removal." The grounds for removal are allegations of sufficient facts to show satisfaction of the jurisdictional statute, here, diversity jurisdiction under 28 U.S.C. § 1332. Alleging the grounds for removal is entirely different from satisfying the statutorily required amount in controversy under § 1446(c)(2) which applies to class actions per 28 U.S.C. § 1453(b).[2] Tellingly, Dart mentions (c)(2) on only two pages of its twenty-two page brief, Pet. Br. 7, 13; the amici mention (c)(2) merely in passing.[3] Subsection (c)(2) states:

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[2] 28 U.S.C. § 1453(b) provides: "A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."

[3] Brief of the Washington Legal Foundation ("WLF Br.") 8, 20, 21 (citing § 1446(c)(2) for "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy."); Brief of DRI ("DRI Br.") 11, 18 (citing § 1446(c)(1) for the

(Continued on following page)

> If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that –
>
> (A) the notice of removal may assert the amount in controversy if the initial pleading seeks –
>
> (i) nonmonetary relief; or
>
> (ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and
>
> (B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

---

elimination of the one-year limitation on removal of class actions and (c)(3)(A) for giving defendant the right to remove within 30 days of receiving an "other paper" showing the amount in controversy exceeds the amount required for federal jurisdiction if the initial pleading does not show the requisite amount in controversy); Brief of the Chamber of Commerce ("Chamber Br.") 7 (The Jurisdiction and Venue Clarification Act of 2011 ("JVCA") amended § 1446(c): to address issues relating to uncertainty of the amount in controversy when removal is sought."), 8 n.3 (removal burden should be the same in individual and class actions).

28 U.S.C. § 1446(c)(2).[4] Dart does not dispute that the removal statute requires evidentiary proof; it only disputes *when* that proof must be presented. For almost twenty years, the Tenth Circuit has held that the removing party must present evidence of the amount in controversy with the notice of removal. That approach is consistent with: (a) the removal statute, 28 U.S.C. § 1446; (b) the law of other circuits; (c) the procedure governing motions; (d) CAFA; (e) determining federal jurisdiction quickly and easily; and (f) avoiding jurisdictional disputes invited by the absence of any support for conclusory allegations by defendant.

SUMMARY OF THE ARGUMENT

1. *Dart did not comply with 28 U.S.C. § 1446(c)(2)(B).* As Dart had all the damages evidence, Plaintiff's state court petition could not and did not

[4] Section 1446(c)(2) provides that the sum demanded in the state court petition controls the determination of the amount in controversy unless the petition seeks nonmonetary relief or an unspecified money judgment. Here the petition fits § 1446(c)(2)(A)(ii) because Kansas law does not permit a demand for a specific sum. *See* K.S.A. § 60-208(a)(2); Pet. App. 29a. So while Dart had the right to assert the amount in controversy in its notice of removal under § 1446(c)(2)(A), it wholly ignored § 1446(c)(2)(B) which requires evidence upon which the district court can find, "by the preponderance of the evidence," that the amount in controversy exceeds the jurisdictional threshold, which in class action is $5 million. 28 U.S.C. §§ 1446(c)(2), 1332(d)(2).

allege an amount in controversy. Wanting to move to federal court, Dart had only two statutory options: (a) provide the damage information to Plaintiff in state court and wait for an "other paper" virtually admitting that the amount at issue exceeded the federal jurisdictional threshold; or (b) pursuant to (c)(2)(A) allege the amount Dart believed was in controversy *and* under (c)(2)(B) submit evidence backing up its allegation. Dart did neither, instead only alleging in conclusory terms the amount in controversy (which devoid of any facts would not have complied with *Bell Atlantic v. Twombly*, 550 U.S. 544, 556-57 (2007) anyway).[5]

2. *Dart asks to rewrite the removal statute to overcome its mistake.* Realizing its mistake, probably when Plaintiff moved to remand, Dart suggested mediation to stay the case. After mediation failed, Dart finally submitted the evidence of the amount in controversy that it had had all along. But that evidentiary submission was untimely, and the district court remanded, which the Tenth Circuit allowed to

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[5] Section 1446(c)(2)(B) applies to class actions by resolution of the conflict between (i) § 1453(b) stating that only § 1446(c)(1) does not apply to class actions with (ii) the language in § 1446(c)(2 & 3) suggesting that they only apply to individual actions. If the conflict is resolved in favor of (ii) above, class actions have no statutorily authorized way at all to immediately remove a state court petition silent as to the amount in controversy. If the conflict is resolved in favor of (i), defendants facing a putative class action have the same rights as defendants facing individual cases.

stand. Dart now asks this Court to ignore the (c)(2)(B) removal statute by: (a) ignoring all of the removal statute after § 1446(a); and (b) rewriting § 1446(c)(2)(B) to only apply only after a plaintiff moves to remand. The Court should decline Dart's offer to judicially legislate and affirm the remand.

3. *Dart's "justifications" for changing the removal statute are not the law.* Dart tries to justify rewriting of (c)(2)(B) by arguing: (a) from out-of-context snippets from this Court regarding original jurisdiction filings that are not analogous to removal cases; (b) from removal cases in seven circuit courts which Dart claims "assumed" Dart's position which they did not;[6] (c) from a commentator that does not support it either; and (d) from a JVCA House Report or CAFA Senate Report which are not the law and do not support Dart's view when considered as a whole anyway. Congress was well aware of the Tenth Circuit Rule requiring evidence with the notice of removal citing to *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008) in the House Report, and adopting it rather than rejecting it as Dart asks this Court to do. *See* H.R. Rep. No. 112-10, 2011 WL 484052, at *16.

4. *As written, the removal statute is simple to apply and does not encourage wasteful jurisdictional litigation.* The removal statute preserves a defendant's right to dislodge a plaintiff's choice of forum

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[6] The lone exception is a rarely cited unpublished opinion from the Ninth Circuit with no real analysis of the issues that should not be followed.

with a preponderance of evidence. Its language and intent is for jurisdictional discovery to take place in state court, not in federal court. Dart's proposal to allege first and put on evidence later guarantees the opposite result. *Hertz Corp. v. Friend,* 559 U.S. 77, 94 (2010) (jurisdictional discovery "eat[s] up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims producing appeals and reversals, encourage[ing] gamesmanship "); *Navaro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ([T]his Court "will not invite extensive threshold litigation over jurisdiction [because] litigation over whether the case is in the right court is essentially a waste of time and resources."); (JVCA) H.R. Rep. 112-10, 2011 WL 484052, at **1-2 ("Judges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation."); *id.* at **15-16 ("judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice to remove").

ARGUMENT

Although the question presented focuses on when evidence of the amount in controversy must be presented to establish diversity jurisdiction in a case removed from state court, Dart addresses the issue in only three pages of its opening brief, Dart Br. 14-16, and never addresses § 1446(c)(2)(B).

I. The Tenth Circuit, like Other Circuits, Requires Evidence Be Submitted with the Notice of Removal

A. The Tenth Circuit Rule

The Tenth Circuit Rule has been developed carefully over time to be a workable and consistent statutory removal procedure. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001) (evidence first submitted in response to a motion to remand should not be considered); *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F. App'x 775 (10th Cir. 2005) (refusing to consider an affidavit because it was not attached to the Notice of Removal); *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008); *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1246 (10th Cir. 2012). The Rule requires a removing defendant "to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds the jurisdictional minimum and to prove [those] jurisdictional facts by a preponderance of the evidence." *Frederick,* 683 F.3d at 1245-46 (internal quotations omitted). Dart made a conclusory assertion, without factual allegations demonstrating plausibility and without evidence as support, at the time of removal. Pet. App. 20a. Construing the binding Tenth Circuit authority, the district court did not err in holding "the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount

in controversy exceeds $5 million." *Id.* 26a. Nor did the district court err in finding "[t]he Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." *Id.* For almost 20 years, the Tenth Circuit has required evidence to support jurisdictional facts at the time of removal without incident and without the travails Dart and amici suggest. So Dart asks this Court to overturn the venerable line of cases forming the Tenth Circuit Rule.[7]

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[7] Notably, this case is not about the submission of post-removal *supplemental* evidence on the amount in controversy. Dart presented no evidence with the notice of removal so there was no evidence to supplement. The Tenth Circuit Rule permits supplementation under limited circumstances not present here: (a) the notice of removal is deemed amended to include evidence presented within the 30-day time for removal such that the notice of removal is deemed amended with the evidence, Dart Br. 15, n.6, Pet. App. 10a n.8 (citing *Pepsi-Cola Bottling Co. v. Bottling Group, LLC*, No. 07-2315-JAR, 2007 WL 2954038, at **4, 7-8, 12 (D. Kan. Oct. 10, 2007)); (b) the removing defendant submits prima facie evidence with the notice of removal which plaintiff then disputes with its own evidence in which case federal jurisdictional discovery or supplemental evidence may be allowed, *see Public Employers Retirement of New Mexico v. Clearlend Securities*, 798 F. Supp. 2d 1265 (D.N.M. 2011); or, (c) plaintiff (not defendant) offers the evidence to clarify an ambiguous state court petition, but not to contradict or change it. Pet. App. 10a, n.8 (citing *Hehner v. Bay Transport, Inc.*, No. 09-2141-KHV, 2009 WL 1254442 at *1 (D. Kan. May 5, 2009)). Otherwise, post-removal evidence is not allowed. Pet. App. 10a n.8 (citations omitted).

As detailed in Sections II and V, *infra,* this bright-line Tenth Circuit Rule facilitates the application of the removal statutes and the case law construing them.

The Tenth Circuit Rule also pays homage to this Court's historical narrow view of removal jurisdiction. Federal district courts are courts of "limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 552 (2005).

Rather than respect federalism, amici WLF and DRI attack the narrow construction of removal statutes and the correlate presumption against removal. WLF Br. 2-19; DRI Br. 11-15. But parties cannot consent to federal jurisdiction; and a federal court must examine its subject matter jurisdiction and dismiss or remand the case if it is lacking. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701-02 (1982). "If a court lacks subject matter jurisdiction, all rulings are a nullity, lacking any force and effect." *Boeing Wichita Credit Union v. Wal-Mart Real Estate Business Trust,* 370 F. Supp. 2d 1128, 1129 (D. Kan. 2005) (citing *Hart v. Terminex Int'l,* 336 F.3d 541, 542 (7th Cir. 2003)); *see also Stoll v. Gottlieb,* 305 U.S. 165, 171-72 (1938). For these reasons, a party seeking to have a case heard in federal court bears the "burden of persuasion" to establish federal subject matter jurisdiction. *Hertz*

Corp. v. Friend, 559 U.S. 77, 96-97 (2010).[8] That burden should be met when the case begins in federal court, i.e., in the federal complaint where the plaintiff selects the federal forum[9] or in the notice of removal where the defendant selects the federal forum. Because removal strips a state court of jurisdiction, federalism also dictates the strict construction of removal statutes. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941).[10] Congress was

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[8] Dart complains that the Tenth Circuit Rule "places the burden on the defendant to marshal evidence supporting removal." Dart Br. 8. The removing defendant is the one making the removal request, so who else should provide the evidence? Besides, since Dart was the only one with the evidence, who else could present it?

[9] In addition to the federalism concerns noted in the above text, narrow construction of removal statutes is supported by recognition that plaintiff's choice of forum should not be easily overcome such that evidence is required. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (noting plaintiff is the master of his complaint and has the right to choose his forum) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)). *See* Section II, *infra*.

[10] The amici urge this Court to jettison the strict construction of removal statutes and its correlate, the strong presumption against removal. WLF Br. 2-19; WLF Br. 6, 10 n.3 (noting that every regional federal appeals court except one has adopted a presumption against removal); DRI Br. 11-15; DRI Br. 11 (citing 16 James W. Moore, *Moore's Federal Practice* § 107.05, 107.06 (3d ed. 2013) (collecting cases from almost every circuit that apply presumption against removal because it vindicates federalism principles and "makes good sense" on policy grounds)). *See also* DRI Br. 13-14 (recognizing the constitutionally based federalism concern in *Shamrock*). DRI wrongly contends that the Tenth Circuit Rule uses the presumption against removal to rewrite the removal statute to require evidence with the notice

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well aware of this narrow construction and has never acted to change it. *Hall v. United States,* 566 U.S. ___, 132 S. Ct. 1882, 1889 (2012). Dart asks this Court to now reverse course so that federal jurisdiction can be obtained by a defendant's conclusory statement and the removal statutes are no longer narrowly construed. Dart Br. 9-15.

B. The Law of Other Circuits Requires Evidence in or with the Removal Notice

> Many, if not a plurality of, federal courts have adopted a standard that requires the defendant to present facts in the notice of removal establishing the sufficiency of the jurisdictional amount by "a preponderance of the evidence" which must be based on more than conclusory or speculated assertions.

14AA Wright, Miller & Cooper, *Federal Practice and Procedure* § 3702.2 (4th ed. 2009) (footnote omitted citing extensive case law from almost every circuit).

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of removal. DRI Br. 11, 14. To the contrary, the evidentiary requirement is in § 1446(c)(2)(B), which DRI never cited and is surely required if removal is even to be allowed of a petition that is "not removable" prior to the receipt of a document that would allow satisfaction of the bright line removal test evident in 28 U.S.C. § 1446. While DRI might like to trample federalism and the plaintiff's choice of forum, neither § 1446(a) & (b) nor § 1446(c)(2)(B) can be ignored or rewritten by policy arguments about a presumption that Congress surely knew when it enacted, and reenacted, language that DRI ignores.

Consequently, Dart waffles when arguing that "seven circuits require a notice of removal to contain only *allegations* of the jurisdictional facts; [not] *evidence* supporting federal jurisdiction." Dart Br. (i) (emphasis in original). But in its Summary of the Argument Dart equivocates: "seven circuits have held *or assumed* as much." Dart Br. 6 (emphasis added). *See also* Dart Br. 11-12 ("seven circuits have held or assumed"); Chamber Br. 4 (citing the same cases as Dart but only for five circuits, omitting the Second and Fifth circuits).

But, upon review, none of the seven circuits support Dart's position. Dart Br. 12.[11] They follow the Tenth Circuit Rule while Dart cites, at best, dicta. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 770 (11th Cir. 2010) ("notice of removal included the declaration" of the CFO declaring that the defendant had "collected more than $5 million in condominium unit purchase deposits "); [12] *Ellenburg v. Spartan*

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[11] Dart claimed in its Petition that the First Circuit also was in conflict with the Tenth. Pet. 11 (citing *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 51-53 (1st Cir. 2009) (affirming the district court's remand order)). But Dart omits this case from its Brief, tacitly conceding it was wrong. Opp'n to Pet. 19-20.

[12] *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 947-48 (11th Cir. 2000) (allowing declaration of the defendant's human resources director filed within the 30-day window for removal); *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1221 (11th Cir. 2007) ("defendants' notice of removal contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeds that amount and, as such, they are unable to establish federal jurisdiction by a preponderance of the evidence.");

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Motors Chassis, Inc., 519 F.3d 192, 194 (4th Cir. 2008) (the amount in controversy showed on the face of the state court complaint which sought both a refund of the 2003 American Eagle 40MS recreational vehicle [which both sides knew from the invoice retailed for more than $75,000], plus "punitive damages");[13] *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965) (federal question civil rights case where removal was based on the language of the state court petition, so proof of the amount in controversy was not involved at all);[14] *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 985

South Florida Wellness, Inc. v. Allstate Ins. Co., 745 F.3d 1312, 1314-15 (11th Cir. 2014) (citing *McPhail* and noting that affidavit was filed with notice of removal).

[13] *See also Wickline v. Dutch Run-Mays Draft, LLC*, 606 F. Supp. 2d 633, 636-37 (S.D.W.V. 2009) (concluding "the Fourth Circuit [in *Ellenburg*] did not change the analysis used to rule on a motion to remand" and the acceptance of a naked allegation applies only "where a district court examines the sufficiency of the notice of removal *sua sponte* in search of a procedural defect" and remanding on record "entirely devoid of any evidence regarding the amount in controversy requirement" at the time of removal); *Lever v. Jackson Nat. Life Ins. Co.*, No. 3:12-cv-3108-MBS, 2013 WL 436210, at *4 (D.S.C. Feb. 5, 2013) (rejecting Dart's expansive reading of *Ellenburg* and remanding case because defendant failed to prove, "by any standard" satisfaction of the amount in controversy.) (unpub.); *Anthony Marano Co. v. Sherman*, 925 F. Supp. 2d 864, 866, n.1 (E.D. Mich. 2013) (same).

[14] Dart also abandons reliance on *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 882 (5th Cir. 2000) because it was "facially apparent" from the state court petition that the claimed damages exceeded the jurisdictional amount of $75,000. *Id.* at 882-883; Pet. 11; Opp'n to Pet. 23-24.

(7th Cir. 2008) (Easterbrook, C.J.) (following Tenth Circuit Rule with an affidavit filed with the removal notice detailing the calculation. *Id.* at 985.);[15] *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 940, 945-46 (8th Cir. 2012) (removing defendant submitted an affidavit with the notice of removal but the Eighth Circuit concluded the amount in controversy satisfied from the face of the original complaint); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 205-06 (2d Cir. 2001) (the original state court complaint alleged more than the jurisdictional amount).

At least *Janis v. Healthnet, Inc.*, 472 F. App'x 533, 534-35 (9th Cir. 2012) (unpublished) appears contrary to the Tenth Circuit Rule, but it is a one-page unpublished memorandum opinion that does not directly address *McPhail*, the JVCA, or how the allegation only rule would work in practice. If this demonstrates a real conflict among circuits, the Ninth Circuit should not be followed.[16]

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[15] Again, Dart switches horses and no longer relies on *Harmon v. OKI Sys.*, 115 F.3d 477, 478-79 (7th Cir. 1997). Pet. 10-11; Opp'n to Pet. 25.

[16] Practice in the Ninth Circuit appears to be like the Tenth Circuit where evidence supporting the amount in controversy is filed with the notice of removal. *See, e.g., Friend v. Hertz Corp.*, No. 3:07-cv-5222-MMC (N.D.Cal. Oct. 11, 2007) (ECF Doc. # 2, Decl. of Krista Memmelaar).

II. Following the Tenth Circuit Rule, the Statute Governing the Procedure for Removal Requires Evidence with the Notice of Removal

A. Statutory Construction

This Court's purpose is to construe what Congress has written. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). "Congress expresses its purpose by words. It is for us to ascertain – neither to add nor subtract, neither to delete nor to distort." *Id.* Thus, Dart's request that "if challenged" be added to § 1446(c)(2)(B) or everything after § 1446(a) be deleted fails. Dart Br. 10 ("Court's analysis should start and stop with § 1446(a)'s plain language"); Dart Br. 12 ("This Court does not need to venture past [§ 1446(a)]."). No reading of older versions of the removal statute (even if relevant now which is doubtful), can change the words Congress used to set forth the "procedure for removal of civil actions" in 28 U.S.C. § 1446.

"A statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Read as a whole, the removal statute § 1446 provides: (a) properly allege the grounds for removal (satisfaction of the elements of either federal question or diversity under § 1331 or § 1332, respectively); (b) timeliness; and (c) amount in controversy controlled by the initial complaint or (A) if the initial complaint is silent or not controlling, then the amount in controversy can be sufficiently alleged by defendant, *and* (B) proven

by a preponderance of the evidence. Dart failed to do so even though it had the information needed to comply. Pet. App. 27a (Dart conceded that it was "aware of additional facts and data at the time [it] removed the case to federal court ").

B. 2011 Amendment and *McPhail*

The Federal Courts Jurisdiction and Venue Clarification Act ("JVCA") and the House Judiciary Committee Report on the JVCA placed the burden on the removing defendant to either gather the evidence (or plaintiff's admission by "other paper") in state court or produce evidence the defendant already has to prove the amount in controversy so that federal judicial resources are not wasted. H.R. Rep. No. 112-10, 2011 WL 484052, at *16 ("judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice of removal."). Thus, a removing defendant should always have evidence of the amount in controversy to present with the notice of removal when the amount is not established on the face of the initial pleading. Nothing in the House Judiciary Committee Report suggests that a defendant can withhold its own evidence of the amount in controversy at the time of removal.[17]

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[17] Of course, legislative intent from committee reports or speeches given by bill sponsors is dubious and they are not the "law." And, as this Court has said before, Congress's "authoritative

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Dart repeatedly argues that it must "present evidence supporting federal jurisdiction only after a challenge to the jurisdictional allegations in the notice of removal." Dart Br. 7. But no statute so states, not even by implication, despite Dart's argument that "recent additions to § 1446(c)(2) confirm that." *Id.* The removal statute is self-contained and comes before any motion to remand. It does not use any such language about evidence being presented "only after a challenge." If that were the case, the evidentiary language would be found in the remand statute § 1447, not the removal statute.

The language of § 1446(c)(2)(A)(i) & (ii) as well as (B) was added by the JVCA. H.R. Rep. 112-10, 2011 WL 484052, at *2. The purpose of the JVCA was stated: "Judges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." *Id.* at **1-2. One of the "main stakeholder groups" was the "U.S. Chamber of Commerce." *Id.* at *2. Yet, the Chamber now asks this Court to legislate further on its behalf. Chamber Br. The Act also was vetted and promoted by the author of Moore's Federal Practice, *id.* at *2, relied on in part by Dart. Dart Br. 14. The removal changes are addressed in Sec. 103 of the Act,

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statement is the statutory text, not the legislative history." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. at 568); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-150, n.4 (2002).

which modified only § 1441 and § 1446, not the remand statute in § 1447 (where Dart's "if challenged" theory would logically reside). *Id.* at *11.

The Act specifically addressed in § 1446(b), and reaffirmed, the 30-day removal period, *id.* at **13-14, that Dart still complains is too short. Dart Br. 7, 18-19.[18] Congress must have been aware of the simple Tenth Circuit solution to this problem (after all, the House Report later cites *McPhail*, one of the very cases Dart proposes be overruled, 2011 WL 484052 at *16), and implicitly adopted it.

> Second, many defendants faced with uncertainty regarding the amount in controversy remove immediately – rather than waiting until future developments provide needed clarification – out of a concern that waiting and removing later will result in the removal's being deemed untimely. In these cases, Federal judges often have difficulty ascertaining the true amount in controversy, particularly when removal is sought before discovery occurs. **As a result, judicial resources may be wasted and the proceedings delayed when little or no objective**

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[18] But, in fact, Dart was not under a 30-day deadline to remove the initial pleading because, being silent as to the amount in controversy, that pleading was "not removable." Since Dart had no duty to investigate and could wait to remove until it received an "other paper" from Plaintiff showing more than $5 million at issue, Dart had plenty of time. *See*, Section V.D, 37, n.31, *infra*.

> **information accompanies the notice to remove.**

Id. at **15-16 (emphasis added). The problem here is that judicial resources have been wasted because "little or no objective information accompanie[d] [Dart's] notice to remove" even though Dart admits it had the information at the time of removal. Incredibly, what Dart did below (and now proposes be done nationwide) is exactly what Congress intended to (and did) remedy by adopting § 1446(c)(2)(A & B) – some evidence of federal jurisdiction must accompany the notice to remove.

The Act was also intended to address Dart's other supposed problem, that if a defendant did not have the evidence to remove, it would be forced to develop that jurisdictional evidence through state court discovery. Dart Br. 20. But, unlike Dart, Congress viewed state court discovery as the proper means of uncovering evidence needed to support removal:

> If the defendant lacks information with which to remove within the 30 days after the commencement of the action, the bill adds a new subparagraph 1446(c)(3)(A) to clarify that the defendant's right to **take discovery in the state court** can be used to help determine the amount in controversy. If a statement appears in response to discovery or information appears in the record of the state proceedings indicating that the amount in controversy exceeds the threshold amount, then proposed subparagraph 1446(c)(3)(A) deems it to be an "other paper" within the

> meaning of paragraph 1446(b)(3), thereby triggering a 30-day period in which to remove the action. **The district court must still find by a preponderance of the evidence that the jurisdictional threshold has been met.**

2011 WL 484052, at *16 (emphasis added). Moreover, if a defendant truly did not have evidence to remove, it should not claim to know the amount in controversy to start with, especially since it was not required to remove an initial pleading which specified no sum of damages. *See* 28 U.S.C. § 1446(b)(3). Again, Dart's concern was heard and Congress adopted the Tenth Circuit solution, not Dart's.

Finally, Dart quotes the House Report out of context. The broader context is below:

> **In adopting the preponderance standard, new paragraph 1446(c)(2) would follow the lead of recent cases. *See McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008)**; *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006). As those cases recognize, defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants may simply allege or assert that the jurisdictional threshold has been met. Discovery may be taken with regard to that question. In case of a dispute, the district court must make findings of jurisdictional fact to which the preponderance standard applies. If the defendant establishes by a

> preponderance of the evidence that the amount exceeds $75,000, the defendant, as proponent of Federal jurisdiction, will have met the burden of establishing jurisdictional facts.

2011 WL 484052, at *16 (emphasis added). The JVCA "largely codified the holding of *McPhail*." *Butler v. Target Corp.*, No. 12-4092-SAC, 2012 WL 5362974, at *3 (D. Kan. 2012); Note, "Jurisdictional Remix, The Federal Courts Jurisdictional and Venue Clarification Act Presents New Challenges to Federal Litigation," 89 N.D. L. Rev. 163, 174 (2013) (same). If the House Report serves any purpose, it is to confirm that the JVCA adopted the *McPhail* Tenth Circuit Rule requiring both an allegation and preponderance of evidence proving the amount in controversy with the notice of removal. But despite Dart's wishful thinking, neither a provision for federal discovery nor the "in case of dispute" language made it into § 1446(c)(2) and cannot be squared with the adoption of *McPhail*.[19]

In context, the House Report adopts the entire Tenth Circuit *McPhail* solution: (a) a removing

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[19] Although nothing in § 1446(c)(2) allows discovery, a federal court could allow discovery. But given the prohibition on a party seeking discovery before the Fed. R. Civ. P. 26(f) conference and the opposing party's ability to resist such discovery, conducting jurisdictional discovery before completion of the briefing on remand issues would require a federal court order and be virtually impossible before the 30-day remand period in 28 U.S.C. § 1447. Fed. R. Civ. P. 26(d)(1), 26(f). Hence, the removal statute's provision for discovery in the "State proceeding" accommodates this reality of federal practice. 28 U.S.C. § 1446(c)(3).

defendant must present some evidence with the removal notice; (b) that evidence must be proffered within 30 days of service of the complaint if defendant has the evidence in its records or 30 days after state (not federal) court discovery develops it; (c) if the removing defendant's evidence (not just allegations alone) is disputed, discovery may be allowed in federal court, *see Clearlend Sec.*, 798 F. Supp. 2d at 1271 (federal jurisdictional discovery allowed only if a prima facie showing made with the notice of removal) [but, of course, Dart needed no discovery because it had all of the evidence], and, (d) whether the amount in controversy is disputed with plaintiff's evidence (usually the class action plaintiff will have none), the removing defendant has the evidentiary burden of proof based on a preponderance of evidence standard.

C. The Removal Statute Does Not Provide that Evidence Is Only Necessary After the Amount in Controversy Is Challenged

Dart's position is that a removing defendant never has to present any evidence of federal jurisdiction unless challenged. Of course, § 1446(c)(2)(B) says no such thing. Nowhere does the statute use the word "challenged" or describe anything like a challenge. It says: "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) [i.e., notice of removal may assert the amount in controversy] if the district court finds, by a preponderance of the evidence, that the amount in

controversy exceeds the amount specified in section 1332(a)" and 1332(d) per § 1453(b). *See* Sections I, *supra,* and III, *infra.* So the notice of removal may assert the amount in controversy where the state court petition does not, but that assertion must be backed up with evidence on which the district court can make the requisite finding whether plaintiff challenges that evidence or not. And, where defendant offers no evidence of the amount in controversy with the notice of removal, plaintiff has no information on which to base a challenge (and no need since the removal would not be "proper" under the statute).

It is unclear whether Dart contends that the requirement that evidence of the amount in controversy be offered with the removal notice: (a) never existed (since it cites the removal statute before 1988 as requiring evidence in the form of a "verified petition" but suggests that prior cases of this Court nonetheless support its position); (b) was eliminated by the 1988 amendment (since it repeatedly cites case law prior to 1988 as supporting its view); or, (c) was changed by the 2011 amendment (since it repeatedly cites cases before 2011 and snippets of the 2011 House Report trying to support its view).[20] Regardless, neither the 1988 nor the 2011 amendment made any such change as amply demonstrated by the clear

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[20] The quantum of (prima facie) evidence required with the removal notice is not before this Court because Dart did not offer any.

Tenth Circuit law on the issue after both amendments. *Laughlin* (1995); *Martin* (2001); *Oklahoma Farm Bureau Mut. Ins. Co.* (2005); *McPhail* (2008); *Frederick* (2012).[21]

It is significant that the "preponderance of the evidence" requirement is embodied in the removal statute, not in the remand statute, § 1447, i.e., when removal is challenged. When the removal statute is read as a whole, it includes the requirement of evidence. That is in accord with the usual motion practice when a party seeking to achieve a result – in this case defendant seeking to achieve federal jurisdiction – the movant must submit the available proof at the time of the motion. Rarely if ever can a movant hide available facts from the Court and its adversary and spring them after the opposing party's opening brief. Yet that is precisely what Dart proposes. Not a single court has ever authorized that.

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[21] Dart only cites the now superseded 1988 Judicial Improvements and Access to Justice Act, for the change in § 1446(a), stating the grounds for removal, which is not at issue, Dart Br. 11, and never analyzes § 1446(c)(2), which controls the inquiry because it specifically addresses the amount in controversy. *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (specific statute controls over more general provisions).

In 1991, § 1446(c)(4) was amended to read: "(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand." This shows that removal was to be self-contained with "exhibits annexed" so the district court could make a prompt jurisdictional review.

Congress provided the test for removal, and it required a preponderance of evidence for jurisdiction to be "proper." 28 U.S.C. § 1446(c)(2)(B). It did not provide that jurisdiction was proper until successfully challenged.

D. No Other Real Support for Dart's Novel Theory

Dart cites to five sources for its "remove first and worry about evidence later" standard. Dart Br. 14 (citing H. R. Rep. No. 112-10, at *16); 7; 15-16 (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)); 16 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); 16 (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010)); and 14 (citing 16 James W. Moore, *Moore's Federal Practice* § 107.30[2][a][i]). But, none of these hold up upon examination.

The House Report is not the law, and if it was, it literally adopts the tried-and-true Tenth Circuit Rule, even citing the Tenth Circuit *McPhail* case, not the novel approach advocated by Dart. *See*, Section II.B, *supra.*

Dart cites *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) to argue that this Court long ago approved allegations, not proof, of amount in controversy removals. Dart Br. 7; 15-16. But when *Wilson* was issued in 1921, removal required a verified petition stating "facts", i.e., evidence akin to an affidavit

or declaration today. *Wilson*, 257 U.S. at 93-94 ("The petition was properly verified").

Dart also relies on a citation to *McNutt* within *Hertz Corp. v. Friend*, a removal case. Dart Br. 16 (citing *McNutt*, 298 U.S. at 189 as quoted in *Hertz*, 559 U.S. at 96-97). Dart claims *Hertz "assumed* that it was enough for a party seeking removal to allege (not prove) jurisdictional facts in the notice of removal." Dart Br. 5 (emphasis added). But *Hertz* held and assumed no such thing. *Hertz* quoted *McNutt* – which, again, was an original jurisdiction, not removal jurisdiction, case – "When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof. *McNutt, supra,* at 189, 56 S. Ct. 780; 15 Moore's § 102.14, at 102-32 to 102-32.1." *Hertz,* 559 U.S. at 97. This was dicta since Hertz submitted with the removal notice an "unchallenged declaration." *Id.*[22]

The citation of *McNutt* in *Hertz* was to show that the party asserting federal jurisdiction had to prove it, not *when* the removing party had to prove it (plaintiff's original filing if challenged and defendant's notice upon removal). It was not to suggest that the

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[22] Hertz filed a detailed declaration with its notice of removal to establish the amount in controversy necessary for federal court jurisdiction. *Friend v. Hertz Corp.*, No. 3:07-cv-05222-MMC (N.D.Cal. Oct. 11, 2007) (ECF Doc. # 2, Decl. of Krista Memmelaar).

removal notice must be challenged first. *Hertz,* 559 U.S. at 96-97. Courts have repeatedly rejected Dart's attempt to analogize plaintiff's initial federal pleading to establish jurisdiction and a notice of removal.

> The burden on a plaintiff seeking diversity jurisdiction is forgiving: if, in good faith, the plaintiff pleads more than the requisite amount in controversy, that pleading will be accepted unless it can be shown to a legal certainty that the plaintiff cannot collect that amount. Removing CAFA defendants have similarly sought a rule enabling them simply to allege that more than $5 million is in controversy. However, the courts have rejected the analogy.

Newberg on Class Actions § 6:16 (5th ed.) (footnotes 8-9 omitted). *See* 14C Wright, Miller & Cooper, *Federal Practice and Procedure* § 3725, at 95 (3d ed. 1998) (recognizing that "a greater burden [is imposed] on defendants in the removal situation than is imposed on plaintiffs who wish to litigate in federal court by invoking its original jurisdiction" to demonstrate the amount in controversy and "[t]his discrepancy in treatment of plaintiffs and defendants may be justified by the historical tradition that the plaintiff is the master of the forum and is empowered to choose the court system and venue in which litigation will proceed"). *See*, n.7, *supra*.[23]

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[23] Other differences abound. An originally filed federal complaint (a) is a pleading that makes allegations; (b) is filed

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Besides, all three cases, *Wilson, McNutt,* and *Hertz,* predate the latest JVCA change to the removal statute that adopts the Tenth Circuit Rule requiring evidence with the removal notice. *See*, Section II.B, *supra*.

Third, Dart's suggestion that one commentator believes that evidence need be presented only after plaintiff challenges a removal is taken out of context. Dart Br. 14 (citing 16 *Moore's Federal Practice*, § 107.30[2][A][i]). When reviewed in context, the commentator recognizes removal has two components: allegations (first two sentences) and evidence (third sentence, emphasis added).

> The wiser course may be to allege jurisdictional facts more specifically.[24] At any rate, if the jurisdictional allegations are challenged, whether by a party or by the court, the removing party must demonstrate that removal jurisdiction is proper.[25] **A failure to**

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before it is served and a defendant is aware of the case; (c) shows plaintiff's choice of forum; and (d) is in the federal forum originally. The complaint is controlling unless the defendant challenges it. But a removal notice is none of these, so evidence must be submitted.

[24] The first sentence has no footnote or citation.

[25] The second sentence has a footnote citing only to *Ellenburg* (distinguished at 13-14, *supra*) and *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992) (noting strong presumption against removal, removing defendant only alleged amount in controversy was "in the millions of dollars" with no factual support except in a reply brief for summary judgment, remanding to state court even though plaintiff did not challenge jurisdiction

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> **include the requisite jurisdictional facts in the removal petition cannot be cured by amendment after the 30-day removal period has expired.**[26]

Id. (emphasis added). The commentator, even without directly mentioning the JVCA amendments, supports the Tenth Circuit Rule.

III. CAFA Requires Evidence that the Amount in Controversy Is, as Opposed to "Is Alleged to Be," $5 Million

Although erroneously relying on § 1446(c)(2) for its removal without evidence, Dart Br. 7, Dart and the Chamber, in footnotes, suggest that (c)(2) which identifies the general diversity statute, § 1332(a), may not apply in a CAFA context for diversity jurisdiction. Dart Br. 13 n.4; Chamber Br. 8 n.3.[27] But

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because the "allegation . . neither overcomes the 'strong presumption' against removal jurisdiction, nor satisfies [defendant's] burden of setting forth, in the removal petition itself, the *underlying facts*, remanding to state court and rendering entire federal case including summary judgment a wasted nullity).

[26] The last sentence regarding evidence being submitted in the removal petition is supported by the Second, Third, Fourth, and Sixth Circuits, as well as the Tenth Circuit.

[27] Without § 1446(c)(2), CAFA defendants would have no statutory authority at all to remove until plaintiff provides in the state court an "other paper" virtually admitting the amount in controversy exceeds $5 million. Dart's removal was premature. This construction is consistent with the right given to a CAFA defendant to remove a class action without regard to the one-year limitation of § 1446(c)(1) for other civil actions. The

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that argument overlooks § 1453(b) which provides that all of § 1446 applies to class actions "except that the 1-year limitation under section 1446(c)(1) shall not apply" and the unanimous consent of all defendants to removal shall not apply. *See supra* n.2. This means § 1446(c)(2)(B) applies to defendants removing class actions as well. *See* Chamber Br. 8, n.3 (no reason to demand more from CAFA defendant and no reason to demand less either.). To the extent that the reference in § 1446(c)(2) & (3) that refers to § 1332(a) is in conflict with § 1453(b), the conflict should be resolved in favor of a unified removal procedure and against the absurd result that all of § 1446(c)(1-3) is read out for class actions instead of just (c)(1) and unanimous consent as § 1453(b) plainly states. *See supra* n.2. To do otherwise would leave class actions without a removal procedure at all when defendant wants to use its own evidence to prove jurisdiction. CAFA does not eliminate the "preponderance of the evidence" standard for removal as Dart suggests based on the comment of one Congressman. Pet. 16 (citing only the Statement of Rep. Jim Sensenbrenner in 151 Cong. Rec. H723, H727 (daily ed.) Feb. 17, 2005). And, Congress would have been aware that

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better construction is to apply (c)(2) in CAFA removals by resolving the conflict between the § 1332(a) language, perhaps inadvertently left in § 1446(c), and the limited exclusions intentionally placed in § 1453(b).

preponderance of the evidence was the usual test for threshold matters. *See, e.g., Hall,* 132 S. Ct. at 1889.

Paradoxically, Dart admits that there is no reason to treat individual and class case removals different procedurally. Dart Br. 13, n.4. Yet Dart cites the CAFA substantive changes as somehow supporting its across-the-board procedural change. Dart Br. 8. How is not explained. Nor is this supposed CAFA procedural change squared with Dart's argument that the procedural change had already occurred in 1988 (so it was unnecessary in 2005) or would be clarified in 2011 (such that it really was not done). The answer is as Dart originally argued in its petition for rehearing en banc below: CAFA was a substantive change, not procedural. *Dart Cherokee Basin Operating Co., LLC v. Owens,* No. 13-603 (10th Cir. July 5, 2013) (ECF Doc. # 01019085396).

If § 1446(c)(2) is construed to be inapplicable to class actions, CAFA still requires a case that exceeds $5 million for removal, not just a case that is *alleged* to exceed $5 million. 28 U.S.C. § 1332(d)(2) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs "). A controversy that "may exceed" or is "alleged to exceed" will not satisfy § 1332(d)(2) CAFA diversity jurisdiction. Dart cites out-of-context language from *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011), for the substantive change that CAFA allows removal of "any sizeable class action involving minimal diversity." Dart Br. 3.

But CAFA defines sizeable as $5 million or more. Anything less than $5 million is not sizeable enough to be removed to federal court, even if defendant "alleges" the amount in controversy is more. *See* § 1332(d)(2). Dart's mere allegation of an amount of over $5 million does not establish federal court jurisdiction under CAFA which requires an evidentiary showing that the amount in controversy exceeds $5 million even if § 1446(c)(2)(B) does not apply to class actions.

Moreover, this action is not the type of interstate class action of "national importance" that Congress intended to be in federal court under § 1332(d). *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014). This putative class action is of local importance, involving solely state law and approximately 400 royalty owners claiming underpayment of royalties for gas produced from approximately 700 wells, all of which are located in Kansas. Pet. App. 29a, 31a, 39a.

Dart argues that the Senate Report and *Standard Fire Insurance Company v. Knowles* prevents plaintiff's lawyers from gaming the system to remain in state court. Dart Br. 8. Its apparent alternative is that defendants game the system to remove to federal court and sort out jurisdiction later. CAFA gave no such procedural gamesmanship authorization to either side – evidence is the great objective equalizer.

IV. Allegation of the Amount in Controversy Is Not Enough

A. Dart's Misdirection on § 1446(a)

Dart devotes almost its entire opening brief to a non-issue: what "allegations" are required about the "grounds" for removal (federal question or diversity). Dart Br. 1-13, 17-23. But, no one ever questioned Dart's *allegations* about the diversity CAFA "grounds" for jurisdiction – not about when, what, or how the allegations were made. Thus, Dart's argument about § 1446(a) being modeled after the Rule 8 pleading standard is irrelevant. Dart Br. 2, 10; Fed. R. Civ. P. 8.

B. Fed. R. Civ. P. 8 Pleading Standard Applies to the Irrelevant § 1446(a), Not the Relevant § 1446(c)(2)(B), and Was Not Complied with in Any Event.

Section 1446(c)(2) specifically addresses the amount in controversy: (c)(2)(A)(i-ii) covers the *allegation* of the amount in controversy; whereas, (c)(2)(B) covers the *evidentiary proof* of the amount in controversy. Both (A) and (B) must be satisfied – (A) and (B) are joined with the conjunctive "and." *See Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 212, 679 P.2d 1159, 1175 (1984) (distinguishing between conjunctive and disjunctive). Indeed, if (B) is not satisfied, removal is not "proper" under § 1446(c)(2)(B).

Dart's suggestion that its "allegation" of the amount in controversy required under § 1446(c)(2)(A) was sufficient was incorrect. Dart Br. 3. The district

judge specifically found that simply stating the amount in controversy was $8.2 million was "conclusory." The district court below found federal jurisdiction lacking for two reasons (1) the "preponderance of the evidence" test was not met because Dart "fail[ed] to incorporate *any* evidence"; and, (2) the "general and *conclusory* allegations of the petition and notice of removal" were not sufficient to show the amount in controversy exceeds $5 million. Pet. App. 25a-26a (emphasis added). Like the "naked assertion" of an impermissible conspiratorial agreement in *Bell Atlantic v. Twombly,* 550 U.S. 544, 556-57 (2007), Dart's "naked assertion" that the amount in controversy is $8.2 million is conclusory and devoid of "enough factual matter", indeed "any factual matter", to back it up. Thus, Dart's removal failed under § 1446(c)(2)(A); and, even if it only had to plead the amount in controversy, its mere statement of an amount, devoid of supporting allegations demonstrating any plausibility, failed even under its own test.

Dart is doubly wrong, wrong on law, and wrong that its conclusory statement would pass muster under a "1446(a) only" standard. Either way, the district court should be affirmed.

Dart claims, without citing any case law, that allegations of the amount in controversy can be more abbreviated. Dart Br. 3. But that confuses allegations in a plaintiff's federal court original pleading with allegations in a removal notice. The former promotes both plaintiff's choice of forum and an unbiased federal forum without removal, but the latter destroys

plaintiff's choice so more (namely evidence) is required.[28] Dart's position of more abbreviated allegations under § 1446(c)(2)(A) might have some merit if Dart had buttressed its allegations with proof as required by § 1446(c)(2)(B). But that did not happen at the time of removal. The core issue here is when (if ever) does the amount in controversy evidence required under § 1446(c)(2)(B) have to be submitted. The Tenth Circuit has held for almost 20 years that the evidence must be submitted with the removal notice.

While Dart makes much of the argument that § 1446(a) is parallel to the notice pleading language found in Rule 8(a), Dart Br. 2, 10, the extra removal evidentiary requirement in § 1446(c)(2)(B) is not parallel to a pleading standard. If a notice of removal was intended to be a pleading, it could have been included in the list of pleadings, but it was not. *See* Fed. R. Civ. P. 8. If the removal was to be "proper" based on allegations alone, there would have been no need for (c)(2)(B), but the statute was passed by Congress and signed by the President. What other members of Congress said or reports written that were not adopted by Congress and not signed by the President are irrelevant.

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[28] Diversity removal is premised on providing an out-of-state defendant access to an unbiased federal forum if certain procedural hurdles can be cleared. One such hurdle is evidence that the amount in controversy exceeds the federal threshold. 28 U.S.C. § 1446(c)(2)(B).

V. The Long-standing and Better Rule Is to Require Party Alleging Jurisdiction to Prove It at the Time of Removal

By twisting dicta in both circuit and Supreme Court rulings and by relying on plaintiff pleading standards, which are not applicable to a removal motion, Dart cobbles together a proposed standard that condones hiding jurisdictional evidence from the district court, wasting federal court time, and playing games with what should be a fundamental and early determination of jurisdiction.

A. Follow the Statute and Minimize Gaming

DRI Br. 9 quotes part of the House Judiciary Committee Report to the JVCA that defendants need not prove to a legal certainty the amount in controversy, and that allegations of the jurisdictional threshold are allowed. Congress in the JVCA had three options to consider on removal: (1) no evidence (allegations only); (2) preponderance of the evidence; or (3) legal certainty evidence. Defendants favored (1) and plaintiffs favored (3). Congress weighed the benefits and chose the middle ground. The federal district courts would probably prefer that removal jurisdiction be decided simply, easily, and fast, but "it is not [a court's] task to assess the consequences of each approach and adopt the one that produces the least mischief." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Instead, "this Court's charge is to

give effect to the law Congress enacted." *Id.* That law is the Tenth Circuit Rule.

B. Achieve Early Determination on Jurisdiction to Avoid Waste of Judicial and Litigant Resources

The federal district court under the Tenth Circuit Rule adopted by the JVCA leaves almost no questions about federal jurisdiction upon removal. It is either: (a) evident on the face of the initial or amended complaint or "other paper" coming from state court after state court jurisdictional discovery if needed; or (b) prima facie evidence is submitted with the notice of removal.[29] The cards are on the table for the judge to consider. In the former, the plaintiff has virtually admitted the amount in controversy has been exceeded. In the latter, the plaintiff generally has no evidence to dispute so it is a question of the sufficiency of the evidence submitted by the defendant. *See Freebird, Inc. v. Merit Energy Co.,* 597 F. Supp. 2d 1245 (D. Kan. 2009) (evidence defendant submitted was insufficient and case remanded). This achieves

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[29] If the defendant does not have the evidence, the defendant can seek discovery in the state court and then remove to federal court when it has the evidence, because, for class actions, there is no one (1) year limitation on removal, §1453(b), and for individual cases, one (1) year is long enough to develop the damage evidence (and that time is extended if the evidence is hidden in bad faith). Apparently not happy with the Congressional legislation, Dart characterizes this state court discovery as a "significant burden" as well. Dart Br. 7.

the early determination and avoids the waste of judicial and litigant resources over jurisdiction so that the focus can be on the merits. *See Navaro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (this Court "will not invite extensive threshold litigation over jurisdiction [because] litigation over whether the case is in the right court is essentially a waste of time and resources."). It is only Dart's proposal that will cause jurisdictional discovery "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims producing appeals and reversals, encourage[ing] gamesmanship " *Hertz,* 559 U.S. at 94. *See* Section V.F, *infra*.

The Tenth Circuit Rule comports with Rule 1 of the Federal Rules of Civil Procedure which urges construction "to secure the just, speedy, and inexpensive determination of every action and proceeding." Dart's approach would do just the opposite. Indeed, if only a mere conclusory statement is enough, the incentive will be for plaintiff to challenge and require evidence so that the plaintiff can understand the facts relied upon by defendant, obtain discoverable evidence, and understand if the defendant's view of the case and calculation methodology for damage is different than plaintiff's. In any event, it is almost a certainty that a mere conclusory allegation would force a challenge. No such incentive results when evidence is disclosed in the notice of removal; then, there is a remand motion likely only if the plaintiff has contrary evidence (unlikely) or the evidence is so

lacking in veracity or contrary to the alleged damages theory that the plaintiff has a basis for contest, also not the usual case.

C. Simpler Is Better

Simpler is better. *See Mississippi ex rel. Hood,* 134 S. Ct. at 744 ("Our decision thus comports with the commonsense observation that 'when judges must decide jurisdictional matters, simplicity is a virtue.'") (citing *Standard Fire Ins. Co.,* 133 S. Ct. at 1350); *see also Hertz,* 559 U.S. at 94-95. What could be simpler and more commonsensical than submitting available evidence with the notice removing the case from the plaintiff's chosen forum?

Dart argues that the Tenth Circuit approach "unnecessarily complicates" the removal process because it "can lead to sprawling evidentiary submissions on jurisdictional allegations." Dart Br. 8. This case shows just the opposite. Pet. App. 75a. A short declaration is what is generally done, just as it could have been done timely in this case.

D. The Tenth Circuit Rule Has Proven Workable for Almost Two Decades

While Dart bases its argument on assumptions from circuit courts and dicta from this Court, and posits that its "remove first, prove later" approach will work, the Tenth Circuit Rule has been a fully functional and working model for almost two decades.

It has a proven track record, and one which Congress embraced.

Contrary to the Chamber's cry, counsel representing defendants who remove cases from state to federal court have followed this law by filing evidence with the notice of removal without complaints of undue burden or difficulty for years.[30] Even Dart's

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[30] Owens' counsel filed the listed actions in state court. All of them were removed to federal court and attached a declaration to support the amount in controversy. *Eatinger v. BP Am. Prod. Co.*, No. 07-1266-JTM (D. Kan. Sept. 7, 2007) (Notice of Removal ("NOR"), doc. # 1 and declarations in support, doc. ## 1-5, 1-6); *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM (D. Kan. Sept. 26, 2007) (NOR, doc. # 1 and declaration on amount in controversy in support, doc. # 1-4); *Freebird, Inc. v. Merit Energy Co.*, No. 08-1305-WEB (D. Kan. Oct. 14, 2008) (NOR, doc. # 1 and affidavit in support, doc. # 1-3); *Wallace B. Roderick Rev. Living Trust v. XTO Energy, Inc.*, No. 08-CV-1330-JTM (D. Kan. Oct. 24, 2008) (NOR, doc. # 1 and plaintiff's demands for more than $5 million, doc. ## 1-7, 1-8, 1-9); *Freebird, Inc. v. Merit Energy Co.*, No. 10-1154-KHV (D. Kan. May 18, 2010) (NOR, doc. # 1 and affidavit in support, doc. # 1-2); *Hitch Enterprises, Inc. v. Cimarex Energy Co.*, No. CIV-11-13-W (W.D. Okla. Jan. 6, 2011) (NOR, doc. # 1 and declaration in support, doc. # 1-5); *Carlile v. Murfin, Inc.*, No. 11-CV-1186-JWL (D. Kan. July 15, 2011) (NOR, doc. # 1 with declaration in support attached as Exhibit B to doc. # 1); *Wallace B. Roderick Rev. Living Trust v. OXY USA, Inc.*, No. 12-CV-1215-RDR (D. Kan. June 14, 2012) (NOR, doc. # 1 and expert report establishing plaintiff demanded more than $5 million, doc. # 1-7); *Dreitz v. Linn Operating, Inc., et al.*, No. 13-1179-EFM (D. Kan. May 9, 2013) (NOR, doc. # 1 and affidavits in support, doc. ## 1-5 and 1-6); *Hitch Enterprises, Inc. v. OXY USA, Inc.*, No. CIV-13-543-M (D. Kan. May 28, 2013) (NOR, doc. # 1 and affidavit in support, doc. # 1-3); *Catron v. Colt Energy, Inc., et al.*, No. 13-4073-CM (D. Kan. July 3, 2013) (NOR, doc. # 1 and affidavit in support, doc. # 1-1).

former counsel at the time of removal in this case, Morris Laing, filed a declaration with its notice of removal to provide evidence of the amount in controversy in a similar class case. *Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.*, No. 09-1394-CM (D. Kan. Dec. 11, 2009) (notice of removal, doc. # 1 and declaration in support, doc. # 1-4). There is no hardship or undue burden in doing so, and the Tenth Circuit rule has worked well.[31] There is simply no evidence in the record of any hardship or undue burden because experience has shown no such supposed problem exists in the real world.

Dart argues that the Tenth Circuit Rule of being forthcoming with evidence "significantly burdens removing defendants [because it] might require the defendant to search its own records." Dart Br. 7. But Dart made no showing that this was a "significant" burden in this case or in any other case. Indeed, it has been accomplished in the Tenth Circuit without problem for almost two decades, as well as by defense counsel in this case.

Second, Dart repeatedly complains that it may only have a "30-day removal window" to do this investigation. Dart Br. 7. That is not evidence of a

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[31] Notably, Dart was able to prepare and file a single eleven paragraph declaration in support of its response to Owen's motion to remand without any difficulty. Pet. App. 75a. It would not have been onerous for Dart to have done the same with its notice of removal.

"significant burden", but an argument that the 30-day window imposed by Congress in § 1446(b) is too short. Again, there is no evidence to suggest that it was too short in this case or in any other case. Moreover, the 30-day window is consistent with the 30 days to respond to requests for production and interrogatories. The 30-day window has also been the test imposed under § 1446(b) for decades, would be easier and faster to gather the information now in the electronic age than then. Besides, Congress reconfirmed the 30-day window a few years ago under the JVCA. Finally, if the search is too burdensome in 30 days, a removing defendant can wait and engage in state court discovery or a mediation and remove when plaintiff proffers the "other paper" (in this case when Dart eventually provided its own amount in controversy evidence to Plaintiff). The 30-day search is entirely self-imposed and not a product of the Tenth Circuit Rule.

The Tenth Circuit Rule removes even the specter of uncertainty that Dart complains about with a clear-cut rule. The 30-day removal clock is only triggered when the right to remove is "unequivocal" which means to "learn with certainty" that removal can be done. *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979). There is no duty for defendant "to investigate and determine removability when the initial pleading merely indicates that the right to remove *may* exist." *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (emphasis in original). Instead, the Tenth Circuit "requires clear

and unequivocal notice from the pleading itself, or a subsequent 'other paper' such as an answer to interrogatory." *Id.* Thus, the Tenth Circuit Rule is both workable and addresses even Dart's supposed concerns.[32]

Finally, instead of arguing that it is a significant burden to search its own records or conduct state court jurisdictional discovery, Dart argues that gathering evidence in either way might be a waste of defendant's time if the amount in controversy is never disputed. Dart Br. 7. But in this case, and almost every case, the damages, which is the amount in controversy, is almost always in dispute. Likewise, in most class actions and in this case, plaintiff has no idea how much the amount in controversy or damages are, but defendant does. And, there will be discovery about the damages and how they are computed in every damage case. It is discovery that will be required and certainly will not be a waste of time for the defendant to gather early. Finally, it cannot be a waste of time for defendant to gather the evidence that Congress requires to support a removal. After all, it is defendant that wants the case removed to federal court and should not be viewed as a waste of

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[32] *See also* 16 James W. Moore, *Moore's Federal Practice*, § 107.30[3][f], 107-190.35 (noting that the better rule is that there is no duty to investigate) (citing Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits, and only citing old cases from the Fourth and Seventh Circuits as contra).

time for defendant to prove its own motion for removal is valid. Finally, allowing conclusory statements from defendant will virtually insure that plaintiffs will challenge that statement (which is after all unsupported by evidence).

E. Transparency Is Better than Hiding Evidence

This case is a perfect illustration of why this Court should not let Dart off the hook for its procedural error. Dart's proposal would make every state case immediately removable based on defendant's allegations alone (subject to Rule 11 of the Federal Rules of Civil Procedure – which we know from practically every summary judgment motion and trial is no substitute for evidence). Plaintiff and the district court, being without any evidence on the amount in controversy, would have no choice but to question it – otherwise plaintiff may litigate a case for a long time only to be rendered a nullity and the district court may do the same. *Boeing Wichita Credit Union*, 370 F. Supp. 2d at 1129 ("If a court lacks subject matter jurisdiction, all rulings are a nullity, lacking any force and effect."). All that will follow because the defendant does not want to be forthcoming with its evidence of the amount in controversy in order to sustain the motion it makes to change the jurisdiction of the case from state to federal court. By doing so, the burden of jurisdictional discovery and motion practice is foisted on plaintiff and the federal district

court, instead of on the party that has the evidence and wants to use it for its own benefit.

F. Problems with Dart's Proposed Construction

With only an allegation about the amount in controversy in the notice of removal, plaintiff has no evidence as to how defendant calculated the amount such that he can meaningfully challenge it or confidently assent to it. And because removal occurs before the Rule 26(f) conference and discovery, plaintiff cannot obtain discovery before the 30-day limit in 28 U.S.C. § 1447 on motions to remand.[33] So with no other options, and with every incentive to obtain prompt discovery that might otherwise take a long time to get, plaintiff will almost certainly move to remand and may also move for jurisdictional discovery. Nor can the district court make an evidentiary finding by a preponderance on a "naked assertion" of the amount in controversy. Under Dart's proposal, jurisdictional discovery is virtually assured and just what the JVCA was enacted to avoid.

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[33] *See* Fed. R. Civ. P. 16(b)(2)(the district court's scheduling order, which sets forth the timing for disclosures, may be issued as late as ninety days after the defendant makes an appearance); Fed R. Civ. P. 26(f)(1) (the parties must meet to plan for discovery, at the latest, twenty-one days before the district court's order under Rule 16(b)(2) is due); Fed. R. Civ. P. 26(d)(1)(no discovery allowed until after the Rule 26(f) conference); Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), and then another 30-day wait for objections to discovery).

What Dart proposes is a mess. Federal courts will be embroiled in federal jurisdiction battles including discovery (which can only be invoked after a Rule 26 conference and scheduling order, and likely a motion to dismiss, and protective order – all of which will be eventually rendered a nullity if there was no federal jurisdiction in the first place).

CONCLUSION – AFFIRM DISTRICT COURT'S ORDER GRANTING REMAND TO STATE COURT

The Tenth Circuit properly considered the removal statute as a whole, including the evidentiary requirement in § 1446(c)(2)(B). No other circuit has truly addressed or assumed that no evidence should be submitted with the notice of removal, especially after the JVCA adopted *McPhail*. The Tenth Circuit's construction has stood the test of time, is consistent with the usual motion practice in federal court, promotes transparency, and conforms to the Congressional standard that federal jurisdiction be easy to determine from evidence presented by the defendant from its own records or from state court discovery. The Tenth Circuit Rule requires no change. It follows the removal statute, this Court's precedent, Rule 1's instruction, common sense, and has a track record of working. This Court should affirm this reasoned approach to make express what the circuits do implicitly already.

The rule is simple and easy to apply. Plaintiff chooses the forum for his lawsuit unless the defendant produces a preponderance of evidence of the amount in controversy to establish federal diversity jurisdiction. Only in this way may a defendant override plaintiff's choice of forum. An allegation or a conclusory assertion, without evidence, does not suffice to carry the removing party's burden to establish federal subject matter jurisdiction at the time of removal. Owens asks this Court to affirm the district court's order granting remand.

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REPLY BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, and CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, on behalf of himself and all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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IN THE

Supreme Court of the United States

No. 13-719

DART CHEROKEE BASIN OPERATING COMPANY, LLC, and CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, on behalf of himself and all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

Respondent Owens agrees with Petitioners that 28 U.S.C. § 1446(a)—the only statute in the United States Code that specifies what a notice of removal must contain—requires allegations of the grounds for removal, not evidence of those grounds. Resp. Br. 34. He could hardly argue otherwise: "Short and plain statement of the grounds for removal" is a pleading standard, not a demand for evidence. "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)

("When the words of a statute are unambiguous," the "first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

It's no surprise, then, that Owens uses his response brief to talk about everything *but* § 1446(a). Topics include the standard of proof that a district court must apply to decide jurisdictional questions, the so-called "presumption" against removal, the differences between federal plaintiffs and removing defendants, the purported inequity of allowing a defendant to "hold back" jurisdictional evidence from the notice of removal, *amici*'s lack of "respect" for "federalism," and so on. But none of those topics is the issue in this case. This case is about what a removing defendant must include in the notice of removal. Section 1446(a) answers that question with a pleading standard, and a familiar one at that: The "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008).

Owens avoids any discussion of § 1446(a)—even going so far as to call the provision "irrelevant." Resp. Br. 34. But ignoring the statute does not make it go away. Congress established a pleading standard for the notice of removal, not an evidentiary requirement. Owens's arguments about other aspects of removal procedure cannot change that fact. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms.").

In all events, Owens's arguments about ancillary issues are not just ancillary; they're also wrong.

ARGUMENT

I. SECTION 1446 ESTABLISHES A PLEADING STANDARD FOR THE NOTICE OF REMOVAL.

A defendant seeking removal to federal court must file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant . in such action." 28 U.S.C. § 1446(a). Section 1446(a) speaks for itself: It calls for allegations of the grounds for removal, not evidence of those grounds. If Congress wanted to require evidence of federal jurisdiction in the notice of removal, it would have said so. It did not. This Court "appl[ies] statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive ").

A. Owens cannot rewrite § 1446(a), so he ignores it. Instead of grappling with the statutory pleading standard, Owens contends that Petitioners "conveniently ignore[]" § 1446(c)—the provision that, according to Owens, "specifies the procedural requirements for both alleging and proving the amount in controversy." Resp. Br. 2. Of course, Petitioners did not ignore § 1446(c); they discussed the provision at some length in their opening brief, explaining how it confirms that a removing defendant must allege the grounds for federal jurisdiction in the notice of removal and can wait for a challenge to those

allegations to present evidence of jurisdiction. Pet. Br. 12-15.[1]

At any rate, Owens misses the point. The Question Presented is not whether a removing defendant must prove jurisdictional allegations by a preponderance of the evidence once those allegations are challenged. The Question Presented is whether a district court errs in refusing to consider evidence of federal jurisdiction simply because the evidence was not attached to the notice of removal.

Section 1446(a) answers that question—the statute calls for allegations, not proof—and § 1446(c) reinforces the statutory pleading standard. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("a statute is to be read as a whole"). Section 1446(c)(2)(A) provides that, in certain cases when the amount in controversy is unclear from the face of the complaint, the "notice of removal may *assert* the amount in controversy." 28 U.S.C. § 1446(c)(2)(A) (emphasis added). The statute says "assert"—which means "[t]o state positively" (*Black's Law Dictionary* 139 (10th ed. 2014)) or "to declare." 1 *Oxford English Dictionary* 708 (2d ed. 1989). It does not say "prove."

Section 1446(c)(2)(A) does not suit Owens's argument, so he brushes it aside and focuses on § 1446(c)(2)(B), which provides that "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the

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[1] By its terms, 28 U.S.C. § 1446(c)(2) applies only to removals "on the basis of the jurisdiction conferred by section 1332(a)"—the ordinary diversity statute. But "[t]here is no logical reason [to] demand more from a CAFA defendant than other parties invoking federal jurisdiction." Pet. App. 11a (Hartz, J., dissenting) (internal quotation marks omitted).

district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." But § 1446(c)(2)(B) does not address the requirements for a notice of removal; it specifies the standard (preponderance of the evidence) that the district court must apply *after* the removing defendant has "asserted" the grounds for federal jurisdiction and the plaintiff has challenged (or the court has questioned) those allegations. Section 1446(a) specifies what a notice of removal must contain: allegations. Section 1446(c) then sets out the standard of proof that the district court must apply if those allegations are challenged. The statute leaves no doubt about that sequencing.

If it did, the legislative history would erase it. "[R]esort to secondary materials is unnecessary to decide this case" (*Negonsott v. Samuels*, 507 U.S. 99, 106 (1993)), but the House Judiciary Committee Report behind § 1446(c) also forecloses Owens's proposed construction of the statute:

> In adopting the preponderance standard, new paragraph 1446(c)(2) would follow the lead of recent cases. *See McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008); *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006). As those cases recognize, defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants *may simply allege or assert that the jurisdictional threshold has been met*. Discovery may be taken with regard to that question. *In case of a dispute*, the district court must make findings of jurisdictional fact to which the preponderance standard applies.

H.R. Rep. No. 112-10, at 16 (2011) (emphasis added). Of course, a dispute about jurisdictional allegations cannot arise until after a defendant files the notice of removal.

Undeterred, Owens contends that the House Report's citation to the Tenth Circuit's *McPhail* decision confirms that Congress intended to require evidence of jurisdiction in the notice of removal. Resp. Br. 22-23. But the House Report doesn't end with the citation to *McPhail*. In the sentences that follow, the Report says that defendants "may simply allege or assert that the jurisdictional threshold has been met" and that the "district court must make findings of jurisdictional fact to which the preponderance standard applies" only "[i]n case of a dispute." H.R. Rep. No. 112-10, at 16.

Regardless, *McPhail* did not address the requirements for a notice of removal and certainly did not adopt Owens's construction of § 1446. On the contrary, the *McPhail* court—following Judge Easterbrook's opinion in *Meridian Security Insurance Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006)—held that "'[w]hat the proponent of jurisdiction must "prove" is *contested factual assertions*.'" *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008) (emphasis added) (quoting *Meridian Sec.*, 441 F.3d at 540); *see also McPhail*, 529 F.3d at 955 ("To recap: a proponent of federal jurisdiction must, if material *factual allegations are contested*, prove those jurisdictional facts by a preponderance of the evidence.") (emphasis added, internal quotation marks omitted). "Factual assertions." "Factual allegations." Not proof. No matter which way Owens turns, § 1446(a)'s pleading standard is staring him in the face. He can "shut it out for a time, but it ain't going away." Elvis

Presley (describing truth, purportedly in a hand-written note in his King James Bible).

Owens works so hard to avoid § 1446(a)'s plain language that he fails to consider the implications of his argument. By his proposed reading of the statute, Congress established a pleading standard *and* an evidentiary requirement for the same document—the notice of removal. Resp. Br. 34. That begs the question: Why include a pleading requirement at all if the defendant must prove jurisdiction through the same document? Owens's construction renders § 1446(a)'s pleading standard superfluous. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (refusing to adopt an interpretation of a statute that would render a piece of it "insignificant, if not wholly superfluous") (internal quotation marks omitted).[2]

B. Section 1446 tracks this Court's longstanding approach to jurisdictional challenges. In *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936), and *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), the Court made clear that the proponent of federal jurisdiction does not need to offer evidence of jurisdiction until after a challenge to jurisdictional

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[2] Owens claims that the seven circuits cited in Petitioners' opening brief "follow the Tenth Circuit Rule." Resp. Br. 13. The opposite is true. *See* Pet. Br. 11-12; *see also, e.g.*, *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (Easterbrook, J.) ("The removing party, as the proponent of federal jurisdiction, bears the burden of describing how the controversy exceeds $5 million. This is a pleading requirement, not a demand for proof."); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 774 n.29 (11th Cir. 2010) ("[Section 1446(a)] would make little sense if a defendant were categorically barred from supplementing its 'short and plain statement' with additional evidence and explanation.").

allegations. *See Wilson*, 257 U.S. at 97-98 ("But if the plaintiff does not take issue with what is stated in the petition [for removal], he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it."); *McNutt*, 298 U.S. at 189 ("If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."); *Hertz*, 559 U.S. at 96-97 ("When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof.").

Owens has no good response to this Court's precedents. He tries to distinguish *Wilson* by arguing that "when *Wilson* was issued in 1921, removal required a verified petition stating 'facts,' i.e., evidence akin to an affidavit or declaration today." Resp. Br. 26-27. But the "verified petition" requirement in the old version of § 1446(a) did not function as an evidentiary requirement; it was a precursor to the Rule 11 requirement that appears in the statute today. *See* H.R. Rep. No. 100-889, at 71 (1988) ("The present requirement of a verified petition is changed to a requirement that a notice of removal be signed pursuant to Civil Rule 11 in keeping with general modern distaste for verified pleading."); 16 James Wm. Moore, *Moore's Federal Practice* § 107.30[2][a][ii][A] (3d ed. 2014) ("The potential for the imposition of Rule 11 sanctions was deemed an adequate substitute for the former requirement of verification.").

Owens discounts *McNutt* because it "was an original jurisdiction, not removal jurisdiction, case." Resp. Br. 27. But he admits that in *Hertz*—which *was* a removal case—this Court relied on *McNutt*. *See Hertz*, 559 U.S.

at 96. And even *McPhail* (another removal case) relied on *McNutt*. *See McPhail*, 529 F.3d at 953.

Owens's only answer to *Hertz* is that its statement about jurisdictional allegations "was dicta since Hertz submitted with the removal notice an 'unchallenged declaration.'" Resp. Br. 27 (quoting *Hertz*, 559 U.S. at 97). That may be true, but *Hertz*'s dictum echoes the holdings in *Wilson* and *McNutt*.

C. Owens also cobbles together a few quotes from prominent treatises—Wright & Miller's *Federal Practice and Procedure*, *Moore's Federal Practice*, and *Newberg on Class Actions*. Treatises cannot trump the statute. Regardless, the treatises support Petitioners, not Owens.

Owens latches onto a single sentence in Wright & Miller: "Many federal courts have adopted a standard that requires the defendant to present facts in the notice of removal establishing the sufficiency of the jurisdictional amount by 'a preponderance of the evidence' which must be based on more than conclusory or speculated assertions." Resp. Br. 12 (quoting 14AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3702.2 (4th ed. 2009)). Owens takes that sentence to mean that a removing defendant must include evidence in the notice of removal. That is not what the treatise is saying, a fact confirmed by other language in the very same passage: "[R]emoving defendants *simply may allege or assert* that the jurisdictional threshold has been met. *In case of a dispute*, the district court must make findings of the jurisdictional facts to which the preponderance standard applies." 14AA Wright et al., § 3702.2 (emphasis added). In focusing myopically on one sentence from the treatise, Owens missed the sentence's context.

Owens makes the same mistake with *Moore's Federal Practice*. After quoting language from the treatise about how the removing party must "demonstrate" jurisdiction only "if the jurisdictional allegations are challenged"—language that forecloses his argument—Owens contends (incredibly) that the treatise "supports the Tenth Circuit Rule." Resp. Br. 30 (quoting 16 James Wm. Moore, *Moore's Federal Practice* § 107.30[2][a][i] (3d ed. 2013)). As proof, Owens points to another statement from the treatise—that the "'failure to include the requisite jurisdictional facts in the removal petition cannot be cured by amendment after the 30-day removal period has expired.'" Resp. Br. 30 (quoting 16 Moore, § 107.30[2][a][i]). Owens misunderstands that sentence. It concerns efforts to cure insufficient removal allegations by amendment; it says nothing about how or when a removing defendant must prove jurisdictional allegations.

Owens's citation to *Newberg on Class Actions* is similarly off the mark. *See* Resp. Br. 28 (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 6:16 (5th ed. 2014)). The passage that Owens quotes suggests that, unlike a federal plaintiff's jurisdictional allegations—which "will be accepted unless it can be shown to a legal certainty that the plaintiff cannot collect that amount"—a removing defendant's jurisdictional allegations are entitled to no such presumption of correctness. *See* 2 Rubenstein, § 6:16. That observation is beside the point. Whatever the purported differences between a federal plaintiff and a removing defendant, their jurisdictional pleading burden is the same. *Compare* Fed. R. Civ. P 8(a)(1) ("a short and plain statement of the grounds for the court's jurisdiction"), *with* 28 U.S.C. § 1446(a) ("a short and plain statement of the grounds for removal").

II. NO PRESUMPTION CAN TRANSFORM "SHORT AND PLAIN STATEMENT OF THE GROUNDS FOR REMOVAL" INTO A DEMAND FOR EVIDENCE.

Unable to explain away § 1446(a), Owens tries to change the subject by invoking the so-called "presumption" against removal. According to Owens, "federalism dictates the strict construction of removal statutes." Resp. Br. 11 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)). "The Tenth Circuit Rule," he argues, "pays homage to this Court's historical narrow view of removal jurisdiction." Resp. Br. 10.

No presumption could change § 1446(a)'s plain language. The statute requires a notice of removal to contain a "short and plain statement of the grounds for removal." How would the Court interpret that language "strictly"? The statute says what it says. This Court's "job is to interpret Congress's decrees neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 612 (2004) ("federal courts should interpret and apply removal statutes in a strictly neutral manner").

At any rate, there is no presumption against removal. *See* Washington Legal Foundation Br. 14-19; Defense Research Institute Br. 11-14. This Court has never announced such a presumption. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (Easterbrook, J.) ("There is no presumption against federal jurisdiction in general, or removal in particular."). Quite the opposite: The

Court has repeatedly held that "[a] statute affecting federal jurisdiction must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (internal quotation marks omitted); *see also Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 661 (1923) ("there is nothing in this which suggests that the plain terms of the [removal] act of 1888 should be taken otherwise than according to their natural or ordinary signification").

Shamrock does not say otherwise. There, this Court addressed whether a plaintiff who sues in state court can later remove the case to federal court if the defendant files a counterclaim. 313 U.S. at 100. The removal statute had previously permitted "removal by 'either party,'" but by the time that *Shamrock* was decided, Congress had amended the statute to permit removal only by the "defendant or defendants." *Id.* at 107 (internal quotation marks omitted). The Court held that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts [was] one calling for the strict construction of such legislation." *Id.* at 108.

Thus, when the *Shamrock* Court used the words "strict construction," it was referring, not to some overriding *constitutional* prerogative to interpret jurisdictional statutes narrowly, but to the *congressional* policy of restricting removal jurisdiction that existed in 1941.

Times have changed. Since 1941, Congress has liberalized removal standards. *See* Washington Legal Foundation Br. 17, 18 & n.8; Defense Research Institute Br. 9-11. That is why this Court in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), rejected the argument that *Shamrock* required strict

construction of an ambiguous removal provision: "[W]hatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Id.* at 697.

The Class Action Fairness Act of 2005 (CAFA) is one such statutory development. CAFA "unquestionably expanded" removal jurisdiction to make it easier for defendants to remove large class actions—reversing "the restrictive federal jurisdiction policies of Congress" that drove the strict construction in *Shamrock*. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 342 (4th Cir. 2008) (Niemeyer, J., dissenting). There is no presumption against removal in any context, and certainly not in the class context. "The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions." *Back Doctors*, 637 F.3d at 830.

III. THE TENTH CIRCUIT'S APPROACH COMPLICATES THE REMOVAL PROCESS.

Owens agrees that "when judges must decide jurisdictional matters, simplicity is a virtue." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). But he suggests that the Tenth Circuit's approach—which requires a removing defendant to attach evidence of jurisdiction to the notice of removal even when the plaintiff does not contest federal jurisdiction—is simpler than § 1446(a)'s approach. "What could be simpler and more commonsensical," Owens asks, "than submitting available evidence with the notice removing the case from the plaintiff's chosen forum?" Resp. Br. 40.

The first rejoinder to Owens's simplicity argument is the same as to all his other arguments: Section 1446(a) establishes a pleading standard. Congress could have required a removing defendant to include all sorts of things in the notice of removal—an affidavit, receipts, an Excel™ spreadsheet—but it chose to require only a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). This Court applies statutes as written, not as litigants would rewrite them. *See Great N. Ry. Co.*, 343 U.S. at 575; *see also 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.").

At any rate, Owens has things backwards: Requiring evidence in the notice of removal would "complicate a case, eating up time and money" as the defendant works to prove jurisdictional allegations that might never be—and often aren't—disputed. *Hertz*, 559 U.S. at 94. And in many (if not most) cases, defendants will feel compelled to gather that evidence within 30 days from the filing of the state-court complaint because of concern (sometimes warranted) over missing the 30-day removal window. *See* 28 U.S.C. §§ 1446(b)(1) and (b)(3). That takes time and money—taxing both the court's and the parties' resources.

How is that simpler than simply alleging the grounds for removal?

IV. PETITIONERS' NOTICE OF REMOVAL SATISFIED § 1446(a)'s PLEADING STANDARD.

Owens also argues that, even if Petitioners are correct that a notice of removal must contain only allegations of the grounds for removal, Petitioners' "conclusory" allegations did not satisfy the statutory pleading standard. Resp. Br. 34-35.

Petitioners' jurisdictional allegations were far from conclusory. Petitioners alleged that they and at least some putative class members are citizens of different States; that the putative class includes approximately 400 people; that the putative class members hold royalty interests in approximately 700 oil and gas wells; that the case involves a dispute about those wells' production since January 1, 2002; that Owens seeks three types of damages; and that, based on all those facts, the amount in controversy exceeds $8.2 million. Pet. App. 39a-40a. As Judge Hartz noted in his dissent from the denial of rehearing en banc, "[a]llegations of the amount in controversy are ordinarily much more abbreviated." Pet. App. 5a.[3]

There is no need to belabor the point: The jurisdictional allegations in Petitioners' Notice of Removal satisfied § 1446(a)'s call for a "short and plain

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[3] Once Owens challenged the allegations in the Notice of Removal, Petitioners submitted a declaration establishing federal jurisdiction. Pet. App. 75a-80a. That declaration included new facts that Petitioners learned after filing the Notice of Removal—including Owens's assertion in a post-removal mediation statement that the amount in controversy is "in excess of $21.5 million." Pet. App. 79a. Petitioners did not "withhold" evidence from the Notice of Removal. Resp. Br. 17. They followed § 1446(a)'s plain teaching.

statement of the grounds for removal." *Cf.* Pet. App. 4a (Hartz, J., dissenting) ("[T]here should be no dispute that Petitioners' notice of removal was adequate, even if we apply *Ashcroft v. Iqbal* "); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

V. THIS COURT CAN AND SHOULD ANSWER THE QUESTION PRESENTED.

The lone *amicus* party supporting Owens—Public Citizen Litigation Group—does not try to defend Owens's construction of § 1446. Instead, Public Citizen raises a new argument about the scope of this Court's certiorari review. It contends that the Court cannot answer the Question Presented but instead is limited to deciding whether the Tenth Circuit abused its discretion in denying permission to appeal.

No party raised that non-jurisdictional argument at the certiorari stage, so it is waived. *See* S. Ct. R. 15.2; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010). Regardless, Public Citizen's argument crumbles upon inspection. Because the Tenth Circuit's denial of the petition for permission to appeal was a "case in the court of appeals" under 28 U.S.C. § 1254(1), this Court can review the merits of the lower court rulings.

Shortly after Congress created the writ of certiorari to give this Court discretion over part of its docket (*see* Act of Mar. 3, 1891, 26 Stat. 826, 828), the Court held in *Forsyth v. City of Hammond*, 166 U.S. 506 (1897)—a case that Public Citizen never cites—that

> [u]nquestionably the generality of this provision [authorizing review of federal appellate decisions by writ of certiorari] was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a *comprehensive and unlimited power*. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. *It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein*. All that is essential is that there be a case pending in the Circuit Court of Appeals

Id. at 513 (emphasis added). Put another way, if there was a "case" in the Tenth Circuit, then this Court has the power to review the merits of the decisions below. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 79 (10th ed. 2013) ("Congress intended that this certiorari jurisdiction over cases in the federal courts of appeals be both discretionary and unlimited in scope.").

Public Citizen concedes that, under *Hohn v. United States*, 524 U.S. 236, 241-42 (1998), "the court of appeals' decision denying permission to appeal was a decision in a case in the court of appeals over which this Court has certiorari jurisdiction under § 1254." Public Citizen Br. 15-16.[4] It nevertheless argues that

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[4] *See also, e.g., Ex parte Quirin* 317 U.S. 1, 24 (1942) ("Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari."); Stephen M. Shapiro et al., *Supreme Court Practice* 80 (10th ed. 2013) (the Court has broadly interpreted the word "cases" in 28 U.S.C. § 1254(1) "to include not only a full-

this Court is confined to answering the narrow question of whether the Tenth Circuit abused its discretion in denying permission to appeal—a question that Public Citizen contends is not worth the Court's time. *Id.* at 16. But *Forsyth* refutes Public Citizen's characterization of this Court's certiorari power: That power "is not affected by the condition of the case as it exists in the Court of Appeals" and "may be exercised before or after any decision by that court and irrespective of any ruling or determination therein." *Forsyth*, 166 U.S. at 513.

Nixon v. Fitzgerald, 457 U.S. 731 (1982), proves the point. *Nixon* was a civil suit seeking damages from former President Nixon for an employment decision that he made in his official capacity while in office. *Id.* at 738-40. The district court denied President Nixon's motion to dismiss based on his claim of absolute immunity, and the D.C. Circuit dismissed Nixon's interlocutory appeal, holding that the district court's order "failed to present a serious and unsettled question" sufficient to bring the case within the collateral order doctrine. *Id.* at 742-43 (internal quotation marks omitted). President Nixon sought Supreme Court review, and Fitzgerald argued that, because the D.C. Circuit dismissed the case for want of jurisdiction, "the District Court's order was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of § 1254." *Id.* at 742. This Court rejected Fitzgerald's argument and held that the Court possessed certiorari jurisdiction under § 1254. *Id.* at 742, 743 & n.23.

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blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals or a judge thereof").

But the Court did more than that. It also resolved the underlying merits question that the D.C. Circuit never addressed—whether President Nixon was entitled to absolute immunity: "Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution." 457 U.S. at 742, 743 & n.23. Public Citizen tries to distinguish *Nixon* by suggesting that the case involved the "exceptional circumstances" of a claim against a former President (Public Citizen Br. 17), but this Court's certiorari power does not wax and wane based on parties' perceptions of how important they or their underlying claims are. The Court has decided the merits after the circuit court declined discretionary review in circumstances not involving a former Commander-in-Chief. *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 449 (1997) (resolving the merits of a habeas petitioner's challenge after the circuit court exercised its discretion to deny a certificate of probable cause).

Standard Fire—which came to this Court in the same procedural posture as this case—is another example of the Court's deciding the merits on certiorari review after the circuit court denied discretionary review. *Standard Fire*, 133 S. Ct. at 1348. The Court did not limit its review to deciding whether the Eighth Circuit abused its discretion in denying permission to appeal but instead resolved the underlying merits question about CAFA's amount-in-controversy requirement. *Id.* Public Citizen contends that the parties in *Standard Fire* "appear to have overlooked" the issue that it raises here (Public Citizen Br. 2), but the respondent in *Standard Fire* made a similar argument to the one that Public Citizen makes (*see* Greg Knowles's Brief in Opposition to The

Standard Fire Insurance Company's Petition for a Writ of Certiorari 6-11), without success.

Regardless, the outcome should be the same whether this Court reviews the district court's remand order or the Tenth Circuit's order denying permission to appeal. The decisions below rest on a clearly erroneous interpretation of § 1446—ossified in the Tenth Circuit's jurisprudence—and implicate questions of national importance about removal procedure. Remand orders are not appealable outside the CAFA context (28 U.S.C. § 1447(d)), so this Court can answer the Question Presented only in the class context—where Congress has expressed its clear intent to permit appellate review of remand orders. *See* 28 U.S.C. § 1453(c)(1) ("notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed").

The question of what a notice of removal must contain "is a pure issue of law, appropriate for [this Court's] immediate resolution." *Nixon*, 457 U.S. at 743 n.23.

CONCLUSION

The district court's order remanding this case to Kansas state court should be reversed.

Respectfully submitted,

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August 22, 2014

AMICUS CURIAE BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, *ET AL.*,

Petitioners,

v.

BRANDON W. OWENS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE RETAIL LITIGATION CENTER, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND BUSINESS ROUNDTABLE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE RETAIL LITIGATION CENTER, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber"), the Retail Litigation Center, Inc. ("RLC"), the National Federation of Independent Business ("NFIB") and Business Roundtable ("BRT") respectfully submit this brief as *amici curiae* in support of petitioners Dart Cherokee Basin Operating Company, LLC, *et al.*[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members operate in nearly every industry and business sector in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that petitioners and respondents have both filed blanket consents to the filing of *amicus* briefs on the Court's docket in this case.

These members have an interest in ensuring that the rules governing removal of class actions to federal court are applied fairly and consistently and in keeping with Congress's intent to establish federal courts as the forum of choice for class actions of national importance.

The RLC is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietorships to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. To fulfill its role as the voice for small business, the NFIB frequently files *amicus* briefs in cases that will affect small businesses.

BRT is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. Member companies comprise more than a third of the total value of the U.S. stock markets and invest $158 billion annually in research and development – equal to 62 percent of U.S. private R&D spending. Established in 1972, Business Roundtable applies the expertise and experience of its CEO members to the major issues facing the nation. Through research and advocacy, Business Roundtable promotes policies to improve U.S. competitiveness, strengthen the economy and spur job creation.

Amici are concerned that the district court's ruling (and the Court of Appeals' refusal to grant review) establish a requirement that defendants sued in state court in the Tenth Circuit amass voluminous evidence *before* removing a case to federal court – all within thirty days of receiving the complaint. Such a ruling ignores the text and history of the general federal removal statute and the Class Action Fairness Act of 2005 ("CAFA"). Accordingly, *amici* believe that reversal of the judgment below is necessary to restore proper removal practice in the Tenth Circuit and ensure appropriate access to federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court – in a decision implicitly endorsed by the Tenth Circuit – ignored clear statutory language and long-established caselaw in holding that a defendant removing a suit to federal court is required to submit evidence to prove jurisdictional facts in conjunction with the filing of a notice of removal. Reversal is necessary to check the Tenth

Circuit's wayward approach and bring it into line with the considered precedent of this Court and several courts of appeals.[2]

First, the district court's decision imposes a novel burden on removing defendants that is wholly unmoored from the text of the removal statute and imposes an unfair burden on removing defendants. By requiring a removing defendant to file a notice of removal "containing a short and plain statement of the grounds for removal," 28 U.S.C. § 1446(a), Congress deliberately tracked the *pleading* requirements of Federal Rule of Civil Procedure 8(a). The district court disregarded these statutory parallels in requiring removing defendants to carry an *evidentiary* burden that plaintiffs do not bear in bringing suit. The result is a double standard that ignores Congress's clear intent. Not only does the district court's decision contravene long-standing principles of removal, but it introduces unnecessary complexity to the jurisdictional inquiry by demanding that defendants produce evidence to support federal jurisdiction in *every* removed case where the jurisdictional prerequisites are not established on the face of the plaintiff's pleading – even those where (as here) the plaintiffs do not dispute that the statutory prerequisites to federal jurisdiction have been satisfied.

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[2] Five circuits have held that a removing defendant is not required to supplement its notice of removal with evidence proving jurisdictional facts. *See Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F. App'x 533, 534 (9th Cir. 2012); *Ellenburg v. Spartan Motors Chassis Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 772-74 & n.29 (11th Cir. 2010).

Second, the district court's refusal to assert jurisdiction over this class action is particularly misguided given the expansive sweep of CAFA. Congress enacted CAFA to afford class-action defendants ready access to a federal forum, instructing courts to interpret the statute broadly in favor of federal jurisdiction. The district court ignored this congressional mandate by strictly construing CAFA's amount-in-controversy requirement and resolving all doubts in favor of remand. In the process, the court sanctioned the kind of gamesmanship that CAFA's drafters sought to stamp out. Under the district court's ruling, a clever plaintiff need only plead vague allegations of damages and run out the clock for thirty days to forestall removal of an action that indisputably belongs in federal court.

For these reasons, *amici* respectfully submit that the Court should reverse the judgment below.

ARGUMENT

I. THE DISTRICT COURT'S DECISION IMPOSES A NOVEL BURDEN ON DEFENDANTS THAT CONFLICTS WITH THE TEXT AND PURPOSE OF THE REMOVAL STATUTE.

In holding that a removing defendant must "incorporate evidence" into the notice of removal to "establish by a preponderance of the evidence that the amount in controversy exceeds" the jurisdictional threshold, *Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR-JPO, 2013 WL 2237740, at *4 (D. Kan. May 21, 2013), the district court misapplied the language of the general removal statute. That statute requires only that a defendant include a

"short and plain statement of the grounds for removal" in the notice of removal, mirroring the jurisdic- jurisdictional burden placed on plaintiffs bringing suit initially in federal court. The district court's contravention of clear statutory text imposes an arbitrarily heightened burden at the time of removal. It also serves to multiply and complicate proceedings related to removal, where simplicity has always been preferred. This Court should reverse the judgment below to ensure that the Tenth Circuit's approach to removal comports with the statutory text, congressional intent, and practical considerations.

A. Requiring Defendants To Submit Evidence With Notices Of Removal Conflicts With The Text Of Section 1446.

The general removal statute directs defendants seeking to remove an action to federal court to file "a notice of removal containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The requirement of a "short and plain statement of the grounds for removal" tracks the requirement in Federal Rule of Civil Procedure 8(a) that a plaintiff include in a complaint "a short and plain statement of the grounds for the court's jurisdiction." This statutory parallel is no accident. In 1988, Congress rejected the decisions of courts that had "require[d] detailed pleading" of the grounds for removal, by amending § 1446 to mandate "that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by [Rule 8(a)]." H.R. Rep. No. 100-889, at 71-72 (1988). Congress thus instructed courts to "apply the same liberal rules that are applied to other mat-

ters of pleading," in an effort to "simplify the 'pleading' requirements for removal." *Id.* at 71.

Heeding the directives of Congress, several circuit courts of appeal have deemed it "inappropriate" for a court to "require[] a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint." *Ellenburg*, 519 F.3d at 200; *see also Janis*, 472 F. App'x at 534-35; *Spivey*, 528 F.3d at 986. As the Fourth Circuit has explained, "just as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that '[t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332,' so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner." *Ellenburg*, 519 F.3d at 200 (citations omitted).

Congress recently reaffirmed that courts should liberally construe the jurisdictional allegations in a notice of removal when it enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA"), which amended 28 U.S.C. § 1446(c) "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011). Congress stressed that "defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met"; it is enough to "simply allege or assert that the jurisdictional threshold has been met." *Id.* at 16. Only "[i]n case of a dispute" must the district court

"make findings of jurisdictional fact to which the preponderance standard applies." *Id.*[3]

Section 1446 comports with long-standing principles regarding allocation of the burden to show federal jurisdiction. As this Court has recognized, the party asserting jurisdiction must support each element "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Consequently, a defendant need only "allege" in the notice of removal "the facts essential to show jurisdiction," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936), a requirement satisfied by "general factual allegations," *see Lujan*, 504 U.S. at 561. Only where these allegations are "challenged by his adversary[,]" is a defendant required to proffer evidence supporting the allegations in the removal notice. *McNutt*, 298 U.S. at 189; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) ("*When challenged on allegations of jurisdictional facts*, the parties must support their allegations by competent proof.") (emphasis added).

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[3] Although the text of amended § 1446(c) expressly mentions the general diversity statute, 28 U.S.C. § 1332(a), and not CAFA, "'[t]here is no logical reason why [courts] should demand more from a CAFA defendant than other parties invoking federal jurisdiction.'" *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1238 (10th Cir. 2013) (Hartz, J., dissenting) (citation omitted). Indeed, if a CAFA defendant's removal burden were to differ from that of other defendants, it should be *less* onerous, given the explicit congressional directive that CAFA be construed broadly in favor of federal jurisdiction.

The district court failed to appreciate Congress's intent in enacting § 1446 and overlooked the statute's parallels with the pleading requirements of Rule 8. In effect, its decision resurrected the "hyper-technical, code-pleading regime of a prior era" from which Rule 8 (and § 1446) "marks a notable and generous departure." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court should clarify that the district court's demand that a defendant present evidence at the time of removal goes far beyond what § 1446 requires.

B. Requiring Defendants To Submit Evidence With Notices Of Removal Creates An Impermissible Double Standard.

The district court's failure to interpret § 1446 in a manner that is consistent with Rule 8 also produces an unfair double standard under which defendants face a higher burden of establishing federal jurisdiction on removal than plaintiffs do in pleading federal jurisdiction in their complaints. Congress authorized the removal of suits to federal court "almost contemporaneously with the adoption of the Constitution." *Tennessee v. Davis*, 100 U.S. 257, 265 (1879). As this Court recognized long ago, diversity jurisdiction was conceived to mitigate "State prejudices [that] might affect injuriously the regular administration of justice in the State courts." *Chicago & N.W.R. Co. v. Whitton's Adm'r*, 80 U.S. 270, 289 (1871). Congress sought to guarantee the protections of diversity jurisdiction by, in part, affording defendants the option of removing a diversity case from state court to federal court. *Id.* at 289; *see also Case of Sewing Mach. Cos.*, 85 U.S. 553, 573-74 (1873).

Soon after ratification of the Constitution, this Court explained the role of removal in securing equal access to federal courts to both plaintiffs and defendants. "The constitution of the United States was designed for the common and equal benefit of all the people of the United States," the Court wrote, and is "not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights before the same forum." *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816). Without the possibility of removal, the Court continued, "the defendant may be deprived of all the security which the constitution intended in aid of his rights" because "the plaintiff may always elect the state court." *Id.* at 348-49. "Such a state of things can, in no respect, be considered as giving equal rights." *Id.* at 349. The Court's opinion in *Martin* thus "views removal as a procedural device intrinsically necessary for the protection of a defendant's *equal* and *constitutional* right to litigate certain claims in federal court." Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 618 (2004).

In holding petitioners to an evidentiary burden not imposed on plaintiffs seeking to litigate in federal court, the district court overlooked the fact that "Congress created removal as a procedural vehicle to level the playing field between plaintiffs and defendants." *Id.* Instead of leveling the playing field, the Tenth Circuit's approach imposes a heavy evidentiary burden on defendants seeking removal any time the jurisdictional prerequisites are not established on the face of the plaintiff's pleading. After all, a de-

fendant has only thirty days after receipt of the complaint – or, "if the case stated by the initial pleading is not removable," thirty days after receipt "of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case" is removable – to file a notice of removal. 28 U.S.C. § 1446(b). As a result, the district court's ruling will force defendants to compile evidence to support federal jurisdiction within thirty days. And defendants who are unable to complete that task in such a short period will face a difficult decision: remove based on an incomplete record, uncertain whether the federal court will consider it sufficient to prove the amount in controversy, or risk losing the opportunity to remove the case at all by waiting until more evidence has been compiled.

The burden placed on defendants is all the more pronounced given their general lack of access to the discovery necessary to support jurisdictional allegations when a suit is first commenced. *See, e.g.*, Kan. R. Civ. P. 60-226(b)(6)(C) (providing that, absent court direction, expert disclosures need not be made until ninety days before the trial date). In some cases, amassing the evidence necessary to support jurisdictional allegations within thirty days will be an impossible task, wholly depriving defendants of their right to litigate indisputably federal cases in federal court.

For all of these reasons, reversal is required to ensure that courts in the Tenth Circuit are "equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction," *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

C. Requiring Defendants To Submit Evidence With Notices Of Removal Needlessly Complicates The Jurisdictional Inquiry.

The Tenth Circuit's approach will also make removals far more complicated, undermining "the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz*, 559 U.S. at 80. "Simple jurisdictional rules [ ] promote greater predictability," which "is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94; *see also, e.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (explaining that "complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction"); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("'It is of first importance to have a definition [that] will not invite extensive threshold litigation over jurisdiction.'") (citation omitted). Put another way: "[j]urisdiction should be as self-regulated as breathing; litigation over whether the case is in the right court is essentially a waste of time and resources.'" *Navarro*, 446 U.S. at 464 n.13 (citation omitted).

The need for simple jurisdictional standards extends with full force to the removal context. Indeed, Congress made just this point three years ago when it enacted the JVCA in response to judges' expressed frustration that "the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." H.R. Rep. No. 112-10, at 1-2. Judge Wilkinson has echoed similar concerns with respect to class-action removals specifically:

> Although [the removing defendant] bears the ultimate burden of proving by a preponderance of the evidence that the jurisdictional amount is in controversy, it need not produce reams of personnel records simply to present a prima facie case. To require more would lead to voluminous discovery requests and document production at the preliminary stages of what is itself a preliminary jurisdictional issue. Encouraging this sort of deluge adds more litigiousness to already litigious class action undertakings.

Bartnikowski v. NVR, Inc., 307 F. App'x 730, 740-41 (4th Cir. 2009) (Wilkinson, J., dissenting).

The district court's decision turns these principles on their head. Even though respondents did not dispute that this action satisfies the requirements for the assertion of federal diversity jurisdiction, *see Owens*, 2013 WL 2237740, at *3 ("Plaintiff offers no affidavit, declaration or other evidence challenging Defendants' calculation."), the court still required petitioners to submit evidence of the amount in controversy with their notice of removal. Absent reversal, the result will be that defendants in cases falling within the ambit of CAFA will feel obligated to assemble voluminous evidence in virtually every removable action, as "one can assume that an attorney representing a defendant in a case involving at least $5 million would have substantial incentive to be diligent," *Dart*, 730 F.3d at 1235 (Hartz, J., dissenting).

In short, the district court's misguided decision will complicate jurisdictional determinations, "eating

up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims," producing "appeals and reversals, encourag[ing] gamesmanship, and diminish[ing] the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94. For this reason, too, the Court should reverse the judgment below.

II. THE DISTRICT COURT'S DECISION IGNORES CAFA'S SWEEPING EXPANSION OF JURISDICTION.

Congress enacted CAFA to curb the abuses riddling the nation's class-action system by loosening jurisdictional requirements and guaranteeing a federal forum to defendants litigating interstate cases. The district court's ruling is not only contrary to the removal statute itself but also to the fundamental objectives underlying CAFA.

In enacting CAFA, Congress sought to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (citation omitted). Indeed, the "overall intent" of CAFA was "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 35 (2005).

Congress's remedial objective was expressly extended to CAFA's amount-in-controversy provision, which the legislature intended "to be interpreted expansively." *Id.* at 42. According to the Senate Report, "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of

$5,000,000,' the court should err in favor of exercising jurisdiction over the case." *Id.*

Courts of Appeals and commentators have taken note of Congress's command to give CAFA a liberal construction. *See, e.g.*, *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) ("'The language and structure of CAFA indicate that Congress contemplated broad federal court jurisdiction with only narrow exceptions.'") (citation omitted); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."); H. Hunter Twiford, III *et al.*, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7, 9, 60 (2005) (remarking that CAFA ushered in "fundamental changes" to diversity jurisdiction that "greatly liberalize and invite federal court jurisdiction over class actions"); Sara S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1641, 1643 (2006) (observing that CAFA "expanded federal jurisdiction in a major way" and "represents the largest expansion of federal jurisdiction in recent memory").

Despite the impressive body of statutory text, case law, and legislative history insisting that courts should construe CAFA's provisions expansively, the district court here did just the opposite. As a preliminary matter, the court announced that it "narrowly construes removal statutes" and resolves all doubts "in favor of remand," *Owens*, 2013 WL 2237740, at *1. The court made this statement even though CAFA

demands that courts give its provisions a broad interpretation and resolve doubts in favor of federal jujurisdiction, not remand. *See, e.g.*, S. Rep. 109-14, at 43 ("Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.").

To be sure, "[t]he burden of persuasion for establishing diversity jurisdiction remains on the party asserting it." *Hertz*, 559 U.S. at 96 (citation omitted). But congressional intent, as reflected through the statutory text, determines the appropriate mode of interpreting a removal statute. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003). Hence, while strictly construing a removal statute is appropriate when its text suggests such a restrained approach, *see, e.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (relying on the "Congressional purpose to restrict the jurisdiction of the federal courts on removal" to justify strictly construing the general removal statute), "an expansive interpretation of the nature of the right to remove" should accompany a statute evincing an "unusually strong preference for adjudication of [certain claims] in the federal court system," *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994); *see also Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006). Because Congress indicated an "unusually strong preference" for adjudication of class actions in federal courts, CAFA's removal provisions should receive "an expansive interpretation." *See Tex. E.*

Transmission Corp., 15 F.3d at 1243 (applying this rationale to removal provision of the Foreign Sovereign Immunities Act based on Congress's clearly expressed intent).

The district court's cramped interpretation of CAFA in conjunction with § 1446 also rewards gamesmanship, despite this Court's admonition that plaintiffs' use of clever pleading and subterfuge must not be allowed to forestall removal to federal court, *see Standard Fire*, 133 S. Ct. at 1350; *see also* S. Rep. No. 109-14, at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court."). Class-action plaintiffs wishing to remain in state court have every incentive under the Tenth Circuit's approach to allege damages as vaguely as possible. A lack of concrete damages information in the complaint will make it all the more difficult for defendants to compile the necessary quantum of evidence to remove an action to federal court in a timely manner. For this reason too, the district court's ruling should be reversed.

CONCLUSION

For the foregoing reasons, and those stated by petitioners, the Court should reverse the judgment below.

Respectfully submitted,

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May 29, 2014

AMICUS CURIAE BRIEF

No. 13-719

In the Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, AND CHEROKEE BASIN PIPELINE, LLC,
Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[*]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of defense attorneys, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, clientele, and the judicial system. This is such a case. DRI members have extensive experience removing litigation from state to federal court and a strong interest in ensuring that interpretation of the removal statutes remains consistent and fair.

The decision below rewrites the primary federal removal statute and thwarts the policies embodied in that statute. Under the lower court's decision, defendants must amass and submit evidence of removability along with the notice of removal that must be filed within 30 days of a complaint's filing.

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[*] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

In DRI's experience, this rule poses all sorts of practical problems. For example, in many cases, it would be extremely difficult, if not impossible, for a defendant to retain counsel, review and analyze the complaint, decide whether to remove the case, and complete its investigation and responsive jurisdictional discovery in state court all within the 30-day removal window. The lower court's decision imposing such a needlessly burdensome requirement should be reversed.

SUMMARY OF THE ARGUMENT

Congress set forth the requirements for removing a case from state court in 28 U.S.C. § 1446(a). That statute does not require defendants to attach to a notice of removal evidence of the jurisdictional amount in controversy. The lower court's decision imposing such an implied burden is inconsistent with (1) the text of Section 1446(a) and (2) the policies embodied in that provision.

1. If Congress wanted to require the attachment of materials to a notice of removal, it knew precisely how to do so. Section 1446(a) *does* require defendants to attach "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." But Section 1446(a) does *not* require defendants to attach evidence of the amount in controversy.

Instead, Section 1446(a) adopts language from Federal Rule of Civil Procedure 8(a) requiring only a "short and plain statement of the grounds" for removal. Rule 8(a) has never been interpreted to require plaintiffs to submit evidence of the amount in

controversy along with a complaint. Section 1446(a)'s identical language should be interpreted the same way.

The lower court's decision mistakenly relies on a purported "strong presumption against removal." Any antiquated case law that could be read to support such a presumption should be disavowed. Even if there were such a presumption, it would not justify the judicial creation of a burden that is absent from and foreclosed by Section 1446(a)'s plain and unambiguous language.

2. Section 1446(a), as written, creates a simple, efficient, and fair process for removing a case from state to federal court. Defendants need only provide a "short and plain statement of the grounds for removal." Defendants need not prove those allegations unless challenged in a motion to remand filed pursuant to 28 U.S.C. § 1447(c).

The decision below, however, requires defendants to prove those jurisdictional allegations in virtually every case, regardless of whether the allegations are challenged. Such an approach to removal is wasteful. It also places an incredible burden on removing defendants. Under the lower court's rule, defendants must conduct their investigation and complete any jurisdictional discovery in state court within 30 days of a complaint's filing. Section 1446(a) does not impose such a needless and costly discovery burden. The decision below imposing it should be reversed.

ARGUMENT

I. Section 1446(a)'s Plain And Unambiguous Language Resolves The Question Presented.

Although courts "are not free to rewrite the statute that Congress has enacted," *Dodd v. United States*, 545 U.S. 353, 359 (2005), that is exactly what the court below did. As relevant here, Section 1446(a) requires a notice of removal to contain only a "short and plain statement of the grounds for removal." It does *not* require defendants to collect and attach evidence of removability to the notice.

The decision below—engrafting an evidentiary requirement onto Section 1446(a)'s plain and unambiguous text—"more closely resembles inventing a statute rather than interpreting one." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010) (internal quotations omitted). The lower court's decision should be reversed and Section 1446 given its plain meaning.

A. Section 1446(a) Does Not Require Defendants To Submit Evidence Of Removability Along With A Notice Of Removal.

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). Courts must therefore "enforce plain and

unambiguous statutory language according to its terms." *Hardt*, 560 U.S. at 251.

Section 1446(a) is unequivocal. It sets forth the three filing requirements for removing a case from state to federal court: (1) "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure" that (2) "contain[s] a short and plain statement of the grounds for removal" and that (3) attaches "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a).

There is *no requirement* that removing defendants collect and submit evidence of removability along with a notice of removal. If Congress intended to require submission of such evidence, "it easily could have drafted language to that effect." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014). For example, Section 1446(a) expressly requires removing defendants to attach "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." Congress, however, did not require defendants to attach evidentiary proof to support its jurisdictional allegations. "The fact that [Congress] did not adopt this readily available and apparent alternative strongly supports rejecting the [lower court's] reading." *Knight v. C.I.R.*, 552 U.S. 181, 188 (2008).

A court's task is to apply a statute "on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). As this Court has

emphasized, "[w]e do not—we cannot—add provisions to a federal statute." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010). Because Congress did not require the submission of jurisdictional evidence along with a notice of removal, the decision of the court below imposing such a requirement should be reversed.

B. Section 1446(a) Adopts Language From The Federal Rules Of Civil Procedure That Has A Settled Legal Meaning.

Congress did not simply omit an evidentiary requirement from Section 1446(a). It also adopted language with a settled legal meaning that forecloses any such requirement.

"It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861–62 (2014). Consequently, if a word or phrase "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013); *accord Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2247 (2011) (holding that this "basic principle[] of statutory construction require[d] [the Court] to assume that Congress meant to incorporate 'the cluster of ideas' attached to" the employed term).

The Court recently applied this rule of construction in *Mississippi ex rel Hood v. AU*

Optronics Corp., 134 S. Ct. 736 (2014). At issue there was the meaning of the term "persons" in the mass action provision of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(11)(B)(i). Recognizing that CAFA's language mirrored that of Federal Rule of Civil Procedure 20, the Court gave the term the same meaning that courts have given to it in construing Rule 20. As the Court explained, courts must "presume that Congress is aware of existing law when it passes legislation." 134 S. Ct. at 742 (internal quotations omitted).

The phrase that Congress adopted in Section 1446(a)—requiring "a short and plain statement of the grounds for removal"—is a legal phrase of art with a settled meaning. Since its adoption in 1938, Federal Rule of Civil Procedure 8(a)(1) has required plaintiffs to include "a short and plain statement of the grounds for the court's jurisdiction" in a complaint. Courts have uniformly interpreted this language to require only a good faith allegation that the requisite jurisdictional amount exists. *See, e.g.*, *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540–41 (7th Cir. 2006) (Easterbrook, J.); *Jaconski v. Avisun Corp.*, 359 F.2d 931, 934 (3d Cir. 1966). Only "[w]hen challenged on allegations of jurisdictional facts" must the parties "support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010).

Courts have never interpreted Rule 8(a)(1) to require plaintiffs to attach evidence of the federal court's jurisdiction to a complaint. *See, e.g.*, *Gardner v. First Am. Title Ins. Co.*, 294 F.3d 991, 994 (8th Cir. 2002) ("Rule 8(a)(1) is satisfied if the complaint

say[s] enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that it is not supposed to have the power to hear.") (internal quotations omitted); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.) (explaining that Rule 8 only requires "the complaint [to] allege the citizenship of the parties and the amount in controversy"); 5 Charles Alan Wright, Arthur R. Miller, et al. *Federal Practice and Procedure* § 1206 (3d ed. 2014) ("[A]ll that is required is that the allegations in the complaint clearly show that the court's subject matter jurisdiction exists.").

Congress transplanted this exact phrase of art from Rule 8 into Section 1446(a) to define a defendant's obligations in establishing federal jurisdiction in a notice of removal. *See* David D. Siegal, Commentary on 1988 Revision, printed in 28 U.S.C.A. § 1446 (explaining that Section 1446(a) adopts "language borrowed from the general pleading mandate of Rule 8(a)"). It should therefore be given the same settled meaning. Just as plaintiffs need not submit evidence of federal jurisdiction along with a complaint, removing defendants need not attach such evidence to a notice of removal. In both instances, all that is required is a "short and plain statement" of the grounds for federal jurisdiction.

C. Legislative History Supports A Plain-Meaning Construction of Section 1446(a).

"[R]esort to secondary materials is unnecessary to decide this case." *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993). Nevertheless, legislative history

further supports giving Section 1446(a) its plain meaning.

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 amended Section 1446(c) into its present form "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011). Under Section 1446(c), the "removal of [an] action is proper . if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds" the minimum jurisdictional amount.

Removing defendants, however, need not satisfy this evidentiary burden by attaching evidence to a notice of removal. As the House Judiciary Committee Report explains, only "[i]n case of a dispute" must the district court "make findings of jurisdictional fact to which the preponderance standard applies." H.R. Rep. No. 112-10, at 16.

> [D]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, *defendants may simply allege or assert that the jurisdictional threshold has been met.*

Id. (emphasis added).

This rule is consistent with the general trend in recent decades toward easing the procedural requirements of removability in order to make removal practice fairer and more efficient. *See generally* Scott Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 632 (2004).

Congress has, for example, extended the time for filing a notice of removal. *See, e.g., Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 759–60 (11th Cir. 2010). Congress has also simplified the pleading requirements for removal, eliminating the requirement of a verified petition and stating that a notice of removal need only comply with Rule 11. *See, e.g., Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199–200 (4th Cir. 2008). Moreover, Congress has eased the burden on removing defendants by eliminating the requirement that they post a bond. *See* H.R. Rep. No. 100-889, at 72 (1988) (explaining that the bond requirement "impose[d] a cost that may be substantial to some litigants"). More recently, Congress resolved a circuit split regarding the thirty-day period for removal in favor of broader availability of removal. *See, e.g., Pietrangelo v. Alvas Corp.*, 686 F.3d 62, 64–65 (2d Cir. 2012).

The trend toward easing the procedural requirements for removal is especially evident in cases brought under CAFA. Congress enacted CAFA's removal provisions with the goal of furthering the Act's "primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting Act of Feb. 18, 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5). Section 1453, CAFA's removal counterpart, advances this goal by explicitly relaxing Section 1446's requirements: it allows for any defendant to remove without the consent of all other defendants (otherwise required under Section 1446(b)(2)(A)), and it excludes the prohibition on removing class actions

after one year (otherwise prohibited under Section 1446(c)(1)). *See* 28 U.S.C. § 1453(b). This trend toward easing the procedural requirements of removability further supports giving Section 1446(a) its plain meaning.

II. Judicial Presumptions Cannot Invalidate Section 1446(a)'s Plain And Unambiguous Language.

In construing Section 1446(a), the lower court was "[g]uided by" a purported "strong presumption against removal." Pet. App. 28a. Many other federal courts also give substantial weight to an alleged strong presumption against removal in construing federal removal statutes. *See* 16 James Wm. Moore et al., *Moore's Federal Practice* §§ 107.05, 107.06 (3d ed. 2014) (collecting cases applying presumption against removal). There is no support for this purported "strong presumption," and the Court should disavow it.

This Court has never announced a "presumption" against removal, let alone a "strong" one. To the contrary, this Court has emphasized the rule that "[a] statute affecting federal jurisdiction must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Kucana v. Holder*, 558 U.S. 233, 252 (2010). A court cannot, as the court below did, use a presumption against removal to justify imposing new pleading requirements onto plain and unambiguous statutory text.

Courts applying a presumption against removal generally rely on two of this Court's decisions.

Neither decision, however, establishes a presumption against removal.

First, in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, this Court considered whether remand is required when a plaintiff, after removal, amends a complaint to reduce his claimed damages to an amount less than the jurisdictional minimum. 303 U.S. 283 (1938). The Court held that removal was proper notwithstanding a reduction in the claimed damages. *Id.* at 292. In so holding, the Court stated in dicta that "[t]he intent of Congress drastically to restrict federal jurisdiction" in diversity cases "has always been rigorously enforced." *Id.* at 288. This language in no way supports a presumption against removal. Instead, it is merely a restatement of the general principle that statutes affecting jurisdiction should be construed with "precision" and "fidelity" to the words that Congress chose to express its intent. Nothing in that statement suggests that the scales should be tipped against removal.

Second, in *Shamrock Oil & Gas Corp. v. Sheets*, the Court addressed whether a plaintiff who files a suit in state court can later remove that case to federal court if the defendant files a counterclaim against him. 313 U.S. 100 (1941). The Court began by analyzing Congress's amendments to the statutes governing removal. *Id.* at 104–07. Specifically, the Court emphasized that although the statute had previously allowed removal by "either party," later amendments had allowed removal by the "defendant or defendants" alone. *Id.* at 106–07. The Court concluded that those alterations in the statute were "of *controlling significance* as indicating the

Congressional purpose" of restricting the right of removal to defendants only. *Id.* at 107 (emphasis added).

As a secondary rationale, the Court noted that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation," and that federal courts should "scrupulously confine" their own jurisdiction in order to give "[d]ue regard for the rightful independence of state governments." *Id.* at 108–09. But even this secondary rationale does not support a presumption against removal. The Congressional "policy" favoring strict construction was the policy that existed in 1941, when *Shamrock* was decided. Later acts of Congress have expressed a different policy in favor of allowing easier access to federal courts, as discussed above. It is that policy, not the policy that existed over 70 years ago when *Shamrock* was decided, that should guide a court's interpretation of the removal statute.

This Court recognized as much in *Breuer v. Jim's Concrete of Brevard, Inc.*, when it explicitly rejected the argument, based on *Shamrock*, that removal statutes should be strictly construed. 538 U.S. 691, 697 (2003). Notably, this Court reasoned that "whatever apparent force this argument might have claimed when *Shamrock* was handed down *has been qualified by later statutory development.*" *Id.* (emphasis added). In *Breuer*, the petitioner argued that ambiguous language in a statute could be read as an "express" prohibition on removal "once it is coupled with a federal policy of construing removal jurisdiction narrowly." *Id.* After rejecting the

petitioner's reliance on a rule of strict construction, this Court discussed relevant amendments to the removal statutes since the time of *Shamrock*, which unequivocally placed the burden on the plaintiff to find an "express exception" to the general rule allowing removal. *Id.* at 697–98. Notably, the Court concluded that "[a]s *Shamrock* itself said, 'the language of the Act evidence[s] the Congressional purpose.'" *Id.* at 698.

Accordingly, any general policy of restricting federal jurisdiction "affords no basis for subtracting anything from provisions which are definite and free from ambiguity." *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 660 (1923). This is particularly true given the statutory changes since *St. Paul* and *Shamrock* were decided. As discussed above, those changes evince a Congressional policy of making removal simpler and more straightforward.

While the Court in *Shamrock* did allude to federalism concerns, those concerns do not give a court license to rewrite the plain language of the statute by creating and applying a judicial presumption against removal. In fact, because the remand of a case to a state court "frequently is not a reviewable order, the federal court should be cautious about directing remand too easily lest it erroneously deprive a removing defendant of the statutory right to a federal forum." 14B Charles Alan Wright, Arthur R. Miller, et al. *Federal Practice and Procedure* § 3721 (4th ed. 2014).

It is the plain language of the statute that should control a court's interpretation of the removal

statute, not judicially created, one-size-fits-all presumptions. The Court should therefore disavow the "strong presumption against removal" applied by the court below and reaffirm the primacy of Section 1446(a)'s text and congressional purpose.

III. The Lower Court's Rule Imposes Unwarranted Burdens On Removing Defendants.

In undertaking statutory interpretation, this Court remains "mindful of the confines of [its] judicial role," *Hui v. Castaneda*, 559 U.S. 799, 812 (2010), which is "to apply the text of [Section 1446(a)], not to improve upon it." *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).

This Court has repeatedly "reiterate[d] that when a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013). Thus, "it is not [a court's] task to assess the consequences of each [competing] approach and adopt the one that produces the least mischief." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Instead, this Court's "charge is to give effect to the law Congress enacted." *Id.* Because Section 1446 employs such unambiguous language, the Court need not (and should not) weigh policy concerns in answering the question presented here.

In any event, Section 1446(a)'s plain meaning makes good policy sense for at least three reasons.

1. Simplicity. Applying Section 1446(a)'s plain language "comports with the commonsense observation that when judges must decide jurisdictional matters, simplicity is a virtue." *AU Optronics*, 134 S. Ct. at 744 (internal quotations omitted). This Court has repeatedly emphasized the importance of simplicity in jurisdictional rules. *See, e.g.*, *Knowles*, 133 S. Ct. at 1350; *Hertz Corp.*, 559 U.S. at 94. Simplicity "promote[s] greater predictability," which "is valuable to corporations making business and investment decisions." *Hertz Corp.*, 559 U.S. at 94.

The lower court's approach creates, rather than avoids, uncertainty. Defendants often do not know whether or to what extent a plaintiff will challenge jurisdictional allegations. Yet, under the lower court's decision, all of the defendant's jurisdictional evidence must be attached to the notice of removal. *See* Pet. App. 26a. Without knowing whether the plaintiff will contest the jurisdictional allegations at all—much less what arguments the plaintiff might offer in response to those allegations—defendants will feel compelled to err on the side of conducting extensive investigations and seeking voluminous discovery on jurisdictional facts in state court. Otherwise, a defendant would risk falling into the lower court's unwarranted procedural trap.

That uncertainty is avoided, however, by following the plain language of Section 1446(a), which requires a defendant to produce evidence supporting jurisdictional facts only if the plaintiff challenges the allegations set out in the notice of removal.

2. Conserving judicial and litigant resources. The costly investigation and discovery required by the lower court's rule would take place *in virtually every single case.* This includes cases, such as this one, where there is no dispute among the parties that the amount in controversy exceeds the jurisdictional threshold. This approach wastes valuable judicial and litigant resources. If there is no dispute among the parties or court as to the amount in controversy, there is no need to impose such a costly evidentiary burden.

3. Fairness. The lower court's decision is not only wasteful, but it also requires defendants to conduct the requisite investigation and discovery in an extremely limited timeframe. Section 1446 generally requires a defendant file a notice of removal "within 30 days after the receipt of a copy of the initial pleading." 28 U.S.C. § 1446(b)(1). As a result, defendants will be forced to amass evidence supporting jurisdictional facts before the 30-day deadline.

That deadline, however, may be impossible to meet for a host of reasons. In seeking jurisdictional discovery, defendants would be subject to widely variable state discovery rules, not the uniform federal rules applicable after removal. *See* Fed. R. Civ. P. 81(c) (providing that Federal Rules of Civil Procedure apply after removal). Defendants would be entirely dependent upon a state court to expedite discovery to ensure compliance with the 30-day deadline. Discovery in state courts generally does not move at such an expedited pace. *See, e.g.*, Kan. Stat. Ann. § 60-226(b)(6)(C) (2013) (providing that

absent court direction, expert disclosures do not need to be made until 90 days before trial date).

The lower court's rule also invites plaintiff gamesmanship in withholding, limiting, or delaying jurisdictional discovery, which would frustrate or foreclose removal altogether. Even in those situations where the defendant has the requisite evidence in its possession, it may take considerable time and effort to collect the data and analyze it (perhaps with expert assistance) to prove the amount in controversy.

Although there may be limited exceptions to the strict 30-day window for removal, defendants would still face uncertainty about whether those exceptions might apply in their case. For example, a defendant may remove within 30 days of receiving any "paper from which it may first be ascertained" that the case is removable. 28 U.S.C. § 1446(b)(3), (c)(3)(A). That exception, however, provides little comfort for defendants who will be forced to either comply with the 30-day deadline or hope that they will be able to identify a document meeting that standard and then remove within 30 days of its receipt. Similarly, while the decision below appears to leave open some possibility that a defendant may seek jurisdictional discovery after removal in some undefined situations, *see* Pet. App. 26a, that exception also provides little assurance to a prudent defendant seeking to create the requisite evidentiary record.

The better approach is mandated by Section 1446(a)'s plain and unambiguous language. A defendant's notice of removal need only "contain[] a

short and plain statement of the grounds for removal." Only if that statement is challenged must jurisdictional evidence be presented.

CONCLUSION

Section 1446(a) does not require defendants to submit evidence of removability along with a notice of removal. The Court should reverse the decision below imposing such a requirement.

Respectfully submitted,

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May 29, 2014

AMICUS CURIAE BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING CO., LLC, *ET AL.*,

Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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July 2014

QUESTION PRESENTED

Whether this Court has jurisdiction to review the merits of the district court's remand order on a writ of certiorari to the court of appeals, when the court of appeals exercised its discretion to deny petitioner leave to appeal under 28 U.S.C. § 1453(c) and no basis has been shown for setting that decision aside.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in litigation over the use and misuse of class action procedures, and its lawyers have filed briefs on behalf of parties or amici curiae in many such cases.[2] Public Citizen also has an interest in the proper construction of statutory provisions defining and limiting the jurisdiction of federal trial and appellate courts, including this Court. Public Citizen attorneys have frequently represented parties or amici before this Court in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[3]

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

[2] *See, e.g., Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

[3] *See, e.g., Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Will v. Hallock*, 546 U.S. 345 (2006).

These interests converge in cases involving removal jurisdiction under the Class Action Fairness Act (CAFA), and Public Citizen has submitted amicus briefs in this Court's previous ventures into that area. *See Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

Public Citizen submits this brief because the parties in this case, like the parties in *Standard Fire*, appear to have overlooked or given short shrift to a significant threshold issue of jurisdiction: whether this Court may review the merits of a district court's decision to remand to state court a case removed under CAFA when the court of appeals, exercising its discretion under 28 U.S.C. § 1453(c), has denied permission to appeal that decision. Because a proper resolution of this case requires determination of this threshold question, and because the issue has not been adequately addressed by the parties, Public Citizen believes that this amicus brief will assist the Court in determining what issues are properly before it in this case and correctly disposing of them.

STATEMENT

1. CAFA's Provision for Permissive Appeals of Remand Orders—Federal law provides for removal to federal court of many, but not all, cases filed in state courts over which the federal courts possess original subject matter jurisdiction. *See* 28 U.S.C. §§ 1441–1445. Federal courts are required to remand removed cases to state court if they find that they lack subject matter jurisdiction or if removal was procedurally defective. In most cases, 28 U.S.C. § 1447(d) forecloses review of such a remand "on appeal or otherwise." *See Kircher v. Putnam Funds Trust*, 547 U.S.

at 640. That prohibition on review of a district court's remand order applies to this Court as well as to the courts of appeals. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466–67 (1947) ("An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here.").

In enacting CAFA, Congress not only expanded the scope of the federal courts' original and removal jurisdiction over class actions involving state-law claims and parties with minimal diversity of citizenship, *see* 28 U.S.C. §§ 1332(d), 1453(b), but also altered the availability of appellate review for decisions remanding cases removed under CAFA. Congress did not, however, make CAFA remand orders appealable as a matter of right. Rather, CAFA provides that, with one exception, "[s]ection 1447"—which includes the general prohibition on appellate review of remands—"shall apply to any removal of a case under this section." *Id.* § 1453(c)(1). The one exception to § 1447's applicability is "that notwithstanding section 1447(d), a court of appeals *may accept* an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order." *Id.* (emphasis added). Thus, under the statute's plain language, absent permission from the court of appeals, which triggers the exception to § 1447's application, appellate review of a remand order remains barred by § 1447(d).

2. The Denial of Permission to Appeal in This Case—In this case, the district court remanded

a class action removed under CAFA "for lack of subject matter jurisdiction." Pet. App. 28a. The district court based its ruling in large part on its understanding that Tenth Circuit precedent requires a court to consider only facts set forth in the notice of removal to determine subject matter jurisdiction when the existence of federal jurisdiction is not evident on the face of the plaintiff's complaint. Pet. App. 26a–27a. The court's order is unclear about whether the flaw the court saw in the removal notice was the failure to *allege* a non-conclusory factual basis for jurisdiction or the failure to attach all the *evidence* that the removing party would rely upon to meet its burden of proving the existence of jurisdiction under the applicable preponderance standard.[4] That ambiguity is reflected in the court's statement of its holding that it lacked subject matter jurisdiction because "[t]he jurisdictional facts alleged in the Petition and Notice of Removal do not show by a preponderance of the evidence that the amount in controversy exceeds $5 million," as required for CAFA diversity jurisdiction. Pet. App. 28a; *see* 28 U.S.C. § 1332(d)(2).

Regardless of its reasoning, such a jurisdictional remand order in a non-CAFA case would not be "reviewable on appeal or otherwise" by virtue of § 1447(d). *See Kircher*, 547 U.S. at 640–42. Seeking to avail itself of CAFA's exception to that bar on appel-

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[4] *Compare id.* at 27a (stating that the removing party was "obligated to *allege* all necessary jurisdictional facts in the notice of removal" but had failed to "*allege* all of these facts" in the notice) (emphasis added), *with id.* at 26a (stating that "reference to factual allegations *or evidence* outside of the petition and notice of removal is not permitted to determine the amount in controversy") (emphasis added).

late review, Dart Cherokee Basin Operating Co., the class action defendant that had removed the case, filed a timely petition for permission to appeal to the Tenth Circuit. A divided panel of the court denied permission to appeal without explanation, saying only that the court had acted "[u]pon careful consideration of the parties' submissions, as well as the applicable law." Pet. App. 13a.

Dart Cherokee sought en banc rehearing of the denial of permission to appeal, but the court denied the petition by an evenly divided vote of the court's then eight unrecused active judges. Pet. App. 1a–2a. (Two judges were recused, and two more have subsequently joined the court.) The four judges who voted to deny the petition did not explain their decision, but the four who would have granted it filed a dissent arguing that the district court's decision was consistent with neither Tenth Circuit precedent nor the removal statute, and that the court of appeals should have granted permission to appeal to clarify the law. Pet. App. 2a–12a.

Dart Cherokee then filed a petition for a writ of certiorari asking this Court to review the merits of the underlying remand order, but not the propriety of the Tenth Circuit's refusal to allow the appeal. The petition posed only the question "[w]hether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal," Pet. i, and did not argue that the denial of leave to appeal was error. The brief in opposition joined issue on whether the district court's decision (which it equated throughout with "the Tenth Circuit Rule," *see* Br. in Opp. 8, 15, 17, 18, 23, 25, 26, 34) was correct and whether it merited review, with-

out pointing out that, absent some grounds for overturning the court of appeals' denial of leave to appeal, the merits of the district court's decision were not subject to appellate review. *See* Br. in Opp. 1–35.

The parties' merits briefs are likewise devoted to arguing the correctness of the district court's decision, with no argument about whether the court of appeals abused its discretion or otherwise erred in denying leave to appeal, and only a passing nod by Dart Cherokee to the question whether this Court has jurisdiction to review the district court's order. Pet. Br. 1. ("The Court has jurisdiction under 28 U.S.C. § 1254(1). *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Hohn v. United States*, 524 U.S. 236, 242 (1998).").

SUMMARY OF ARGUMENT

Both parties ask this Court to decide an issue that is not properly before it. This Court's certiorari jurisdiction extends only to cases "in the courts of appeals." 28 U.S.C. § 1254. Under the terms of CAFA's removal provision and governing precedents of this Court, the only matter "in" the court of appeals on an application for permission to appeal is whether permission should be granted. Absent grounds for reversing the court of appeals' decision to deny permission to appeal, the merits of the district court's decision are not before any appellate court, including this one.

Dart Cherokee's reliance on *Standard Fire* to support its bald assertion that this Court has jurisdiction to address the merits of the district court's decision is wholly misplaced: *Standard Fire* did not address the issue of the existence or scope of this Court's jurisdiction to review district court remand orders in the face of a court of appeals' denial of leave to appeal, and it

therefore has no precedential weight with respect to jurisdiction.

As for *Hohn*, it stands decisively against Dart Cherokee's claim that the merits of the district court's decision are before this Court. *Hohn* held that when a court of appeals denies leave to appeal, the reviewable "case" that is "in the court of appeals" is the request for leave to appeal, not the merits of the appeal. Although the denial of leave to appeal is reviewable by this Court on a writ of certiorari, the only issue in the case is whether the court of appeals erred in denying leave to appeal; the request for leave to appeal by itself does not place the merits "in" the court of appeals or within this Court's certiorari jurisdiction.

Thus, the only question properly before the Court in this case is whether the court of appeals abused its discretion when it denied leave to appeal. If it did not, then the district court's remand order remains unreviewable by any court. Moreover, showing that the court of appeals erred in denying leave to appeal must require more than demonstrating that the *district court* erred, for if a court of appeals were required to grant leave to appeal whenever a district court erred, then it would no longer have discretion over whether to permit an appeal: To determine whether there was an error that required it to allow the appeal, it would have to decide the merits. Such an approach would transform the permissive appeal afforded by CAFA into an appeal as a matter of right.

In this case, there is no proper basis for finding that the court of appeals abused its discretion in denying permission to appeal. There is no indication that the Tenth Circuit based its denial of leave on an in-

correct legal ruling (or on any legal ruling at all), on a clearly erroneous view of the facts, or on consideration of improper factors. Given the breadth of a court of appeals' discretion to deny a permissive appeal, the court of appeals could have denied review for any number of legitimate reasons.

Perhaps more importantly, the parties to this case have devoted no attention to the question whether the court of appeals abused its discretion. Indeed, Dart Cherokee has not attempted to demonstrate that the denial of permission to appeal was a reversible error under any standard of review. As a result, this court has received no briefing on what factors should guide a court of appeals' exercise of discretion to hear CAFA appeals, what considerations are improper or indicative of abuse of discretion, whether a court of appeals has a duty to explain its decision to deny leave to appeal, or how, if at all, this Court may review a court of appeals' exercise of discretion when the court provided no explanation. Nor, of course, have the parties attempted to relate these considerations to the question whether, in the circumstances of this case, the court of appeals' order constitutes an abuse of discretion.

In light of the parties' failure to address these key matters, all of which are essential to any thoughtful consideration of the sole issue within the Court's jurisdiction, the Court has no basis for concluding that the court of appeals' denial of leave to appeal was an abuse of discretion. The Court should, therefore, either affirm the denial of leave to appeal on the ground that Dart Cherokee has not shown it to be improper or dismiss the writ as improvidently granted.

ARGUMENT

I. The Court Must Begin by Determining the Scope of Its Jurisdiction.

Like any federal court, this Court has "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Accordingly, even when the parties do not dispute the Court's jurisdiction, this Court "bear[s] an independent obligation to assure [itself] that jurisdiction is proper." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

Here, this Court's jurisdiction depends on 28 U.S.C. § 1254, which provides certiorari jurisdiction to review "[c]ases in the courts of appeals." Because the statute makes this Court's jurisdiction contingent on the existence and scope of the courts of appeals' jurisdiction, this Court has often recognized that it must resolve issues concerning a court of appeals' jurisdiction before reaching merits issues. *See, e.g., Will v. Hallock*, 546 U.S. at 349; *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982). When such issues come to its attention, the Court is obligated to address them even if they are not raised by a party. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *United States v. Storer Broad. Co.*, 351 U.S. 192, 197 (1956). In such cases, what was "properly 'in' the Court of Appeals" is a "threshold question" that the Court must address before reaching the merits. *United States v. Nixon*, 418 U.S. 683, 690 (1974).

Contrary to Dart Cherokee's assertion, *Standard Fire* is not precedent for the view that the Court has jurisdiction to review CAFA remand orders following

a court of appeals' denial of leave to appeal because the decision neither considered nor addressed that issue. In *Standard Fire*, as here, a district court had remanded a case removed under CAFA, ruling that it lacked jurisdiction because the amount-in-controversy requirement had not been met, and the court of appeals had denied permission to appeal without expressing any view on the merits of the district court's decision. *See Knowles v. Standard Fire Ins. Co.*, 2012 WL 3828891 (8th Cir. Jan. 4, 2012), *reh'g en banc denied*, 2012 WL 3828845 (8th Cir. Mar. 1, 2012). This Court granted certiorari and reversed the district court on the merits of its remand order, but, as in this case, the parties did not argue that this Court lacked jurisdiction to address the merits without first considering the propriety of the court of appeals' denial of permission to review. As a result, this Court's opinion nowhere addressed that question.[5] Rather, although noting that the court of appeals had exercised its statutory discretion to decline review, the Court proceeded to review the merits of the district court's remand order without considering any jurisdictional impediments to doing so. *See* 133 S. Ct. at 1348.

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[5] The respondent's brief in opposition in *Standard Fire* pointed out that the Eighth Circuit had not decided the merits, but did not suggest that the merits of the district court's order were not properly before this Court on a writ of certiorari; the brief argued only that the issue was not worthy of this Court's attention absent an appellate decision. *See* Br. in Opp. 6–8, *Standard Fire* (No. 11-1450). Public Citizen's amicus brief on the merits also did not address the issue of the effect of the denial of permission to appeal on this Court's jurisdiction, as we, too, overlooked the question.

This Court has long recognized that decisions that address the merits without considering and ruling on jurisdictional impediments are not precedents on the issue of jurisdiction: "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *see also, e.g.*, *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). *Standard Fire* thus "does not stand for the proposition that no [jurisdictional] defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448–49 (2011). "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974).

II. The Court's Jurisdiction Over This Case Is Limited to the Question Whether the Tenth Circuit Properly Denied the Application for Permission to Appeal.

Because *Standard Fire* does not resolve the issue, this Court must determine at the outset what case was "in the court of appeals" within the meaning of 28 U.S.C. § 1254 to identify what issues, if any, are properly before it on a writ of certiorari to that court. That determination requires consideration of the statutory authority for appellate consideration of remand orders under CAFA.

A. A federal court of appeals may obtain jurisdiction to hear an order remanding a class action under CAFA by "accept[ing]" the appeal on an application to review the remand order under § 1453(c)(1). If the court of appeals accepts the appeal, the merits of the

remand order are "in the court of appeals," and this Court can subsequently grant certiorari to consider the merits as well. *See Hertz Corp. v. Friend*, 559 U.S. 77, 83 (2010). If, however, the court of appeals denies the application, the merits of the district court's remand order are never before the appellate court, and appellate review of the remand order remains prohibited by § 1447(d). In that circumstance, the only "case" in the court of appeals is the request for review, and the only issue properly subject to review by this Court under § 1254 is the propriety of the court of appeals' resolution of that case—that is, its denial of the application. The merits of the district court's remand decision, by contrast, were never "in the court of appeals" because the court of appeals did not allow them in.

These propositions follow directly from *Hohn v. United States*, 524 U.S. 236, this Court's most robust engagement with what constitutes a case "in" the court of appeals under § 1254. *Hohn* concerned the habeas corpus statute's requirement that a habeas petitioner obtain a "certificate of appealability," or "COA," before he may appeal a district court's denial of habeas relief. 28 U.S.C. § 2253(c)(1)(B). In *Hohn*, a judge of the court of appeals had denied a COA on the ground that the petitioner had failed to make the required "substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and the issue before this Court was whether that threshold determination as to whether to allow an appeal was reviewable by the Court under § 1254.

This Court held that it had jurisdiction to consider that limited issue because "Hohn's application for a certificate of appealability constitutes a case under

§ 1254(1)." 524 U.S. at 241. In filing that application with the appellate court, Hohn had placed "[t]he dispute over [his] *entitlement to a certificate*" in the court of appeals and, through § 1254, before the Court once it granted certiorari. *Id.* (emphasis added). Thus, the Court had jurisdiction to consider, not the underlying merits of the habeas petition, but only the "threshold jurisdictional inquir[y]" whether the court of appeals should have granted a COA and allowed an appeal of the merits. *Id.* at 249.

This Court's decisions following *Hohn* make clear the filing of an application for a COA does not itself place the underlying merits dispute in the court of appeals and does not allow this Court to skip over the question whether a COA should have issued and proceed directly to the merits. Rather, as the Court has emphasized, "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, this Court's review of the denial of a COA "is not the occasion for a ruling on the merit of [a] petitioner's claim," even though appealability in the habeas context depends on whether a claim is substantial, a determination that obviously requires a preliminary assessment of the merits. *Id.* at 331. Indeed, "the statute forbids" an appellate court to "sidestep[]" the process by deciding the merits without first determining whether a COA may issue. *Id.* at 336; *see also id.* at 342. Accordingly, in *Miller-El*, this Court ruled only on whether the court of appeals erred in denying a COA, and remanded for the court of appeals to decide the merits of the appeal when it determined that the court had erred. Only after the court of appeals affirmed the denial of the petition on the merits did this Court take up the

merits and hold that the petitioner was entitled to habeas relief. *See Miller-El v. Dretke*, 545 U.S. 231, 235 (2005).

Similarly, in *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court considered only legal issues posed by the denial of a COA, not the merits of the habeas petitioner's claim. *See id.* at 485. As the Court pointed out in *Slack*, the holding of *Hohn* was that the Court has "statutory certiorari jurisdiction *to review the denial of a COA*." *Id.* at 482 (emphasis added). As *Hohn*, *Miller-El*, and *Slack* illustrate, jurisdiction to review that question is not the same as jurisdiction to decide the underlying merits.

If the filing of an application for a COA by itself placed both the entitlement to such a certificate and the merits of the underlying appeal "in" the circuit court, this Court could grant certiorari to consider the merits without determining whether the standards for a COA had been met, thus "sidestep[ping]" § 2253(c). *Miller-El*, 537 U.S. at 336. This Court could then use its certiorari power to hear "cases in the courts of appeals" to decide suits which Congress intended to keep *out* of the courts of appeals. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) ("Congress intended the COA process ... to further limit the courts of appeals' jurisdiction over habeas appeals.").

Thus, *Hohn* and its progeny do not suggest that this Court may consider the merits of an appeal without first determining whether that appeal was properly "in" the appellate court. To the contrary, they confirm that considering the propriety of the court of appeals' decision not to accept an appeal is a prerequisite to consideration of the merits.

This Court's consideration of cases in which courts of appeals have held they lack jurisdiction to hear an appeal under 28 U.S.C. § 1291 because of the absence of a final judgment demonstrates the same point. In such instances, a case was "in the court of appeals," making review proper under § 1254, but the issue presented by such a case is whether the court of appeals correctly determined that it lacked jurisdiction. The "case" before the court of appeals did not comprehend the merits of the nonappealable order, and this Court cannot leapfrog the threshold jurisdictional issue to decide the underlying merits.

If this Court determines, in such a case, that a court of appeals correctly refused to accept jurisdiction of an appeal, the Court's inquiry ends: It cannot proceed further to address the merits of the issue that was not before the court of appeals, but must affirm. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 320 (1995). Conversely, if the court of appeals has incorrectly *asserted* jurisdiction over an appeal, the propriety of the appeal itself presents a "case in the court of appeals" over which this Court has certiorari jurisdiction under § 1254, but the determination that the court of appeals lacked jurisdiction requires vacatur or reversal of the lower court's decision without consideration of the merits of the issue, which itself was never *properly* "in" the court of appeals. *See, e.g., Will v. Hallock*, 546 U.S. at 355; *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723–24 (1977).

B. Application of these principles here shows that, although Dart Cherokee is correct in asserting that the court of appeals' decision denying permission to appeal was a decision in a case in the court of appeals over which this Court has certiorari jurisdiction un-

der § 1254, Dart Cherokee is fundamentally wrong about the nature of that case and the issues it presents. The case in the court of appeals was the application for permission to appeal, and the issue that the case presents here is whether the denial of permission was reversible error. If the denial of permission was not error, then, the merits of the district court's remand order are not, and have never been, "in" the court of appeals and, therefore, are not properly before this Court.

This conclusion not only flows from the logic of *Hohn*, but is also strongly reinforced by a consideration not present in that case: §1447(d)'s bar to any review of a district court's remand order, which by the terms of § 1453(c)(1) applies to CAFA cases *except* when the court of appeals "accept[s] an appeal." Reviewing the correctness of the district court's remand order in the face of a proper exercise of the court of appeals' discretion *not* to accept an appeal would violate the command of § 1447(d), which applies to this Court as much as to the courts of appeals. *Flowers*, 330 U.S. at 466–67.[6]

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[6] Section 1447(d) also precludes the possibility that the Court could review the remand order via a common-law writ of certiorari and thus bypass the question whether the merits of the order were "in the court of appeals" under § 1254. By its plain terms, § 1447(d)—which, as discussed above, remains applicable absent permission to appeal from the court of appeals—bars review of district court remand orders through common-law writs as well as appeal. *See, e.g.*, *Gravitt*, 430 U.S. at 723. Common-law certiorari, moreover, generally "may not be used as a substitute for an authorized appeal," and is "not permissible" where a statute forecloses or limits review. *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 203 (1945). Thus, this Court has "rejected use of the all writs provision to enable the Court to review a low-

(*Footnote continued*)

If this Court were to determine that a court of appeals was somehow *required* to exercise its discretion to accept an appeal in a particular case, it arguably would have *discretion*, in exceptional circumstances, to proceed to consider the merits without first remanding to the court of appeals. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. at 744–58 (deciding merits of former president's claim of absolute immunity after first holding that the court of appeals erred in dismissing the appeal under 28 U.S.C. § 1291). Addressing the merits issues in such a case would be comparable to issuing a writ of certiorari before judgment in the court of appeals: This Court's holding that the court of appeals erred in declining to hear the appeal would mean that the appeal itself was properly in the court of appeals, providing this Court with jurisdiction over that "case" even though the court of appeals had not yet ruled on its merits.

This Court's rules make clear, however, that granting certiorari before judgment is appropriate "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. More typically, because the Court values "the benefit of thorough lower court opinions to guide [its] analysis of the merits," and generally "do[es] not decide in the first instance issues not decided below," the Court will "remand for resolution of any claims the lower courts' error prevented them from addressing" when it has

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er court's determination where jurisdiction did not lie under an express statutory provision." *Pa. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985).

"reverse[d] on a threshold question." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (internal quotation marks and citations omitted). In any event, however, the choice of proceeding or remanding would not arise unless this Court first decided the sole issue properly within its jurisdiction in the first instance: whether the court of appeals erred in refusing to accept the appeal.

III. Whether the Court of Appeals Abused Its Discretion in Denying Review Is a Different Question from Whether the District Court Erred in Remanding.

Unlike the availability of a COA in a habeas case, which turns to a significant degree on a legal determination that can be reviewed de novo by this Court, whether to permit an appeal of a CAFA remand order is a wholly discretionary determination subject to review only for abuse of discretion. Section 1453(c) provides that a court of appeals "may accept an appeal" from a remand order in a CAFA case. "The word 'may' clearly connotes discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). And the Senate Report accompanying CAFA's enactment confirms what the statute's language makes clear: The statute "provides discretionary appellate review of remand orders." S. Rep. No. 109-14, at 49 (2005).

Moreover, § 1453(c)'s permissive language echoes that of 28 U.S.C. § 1292(b), which provides that when a district court certifies that an interlocutory order is appropriate for immediate appeal, the court of appeals "may thereupon, in its discretion, permit an appeal" if a party makes a timely application for permission. This Court has long recognized that permission to appeal under § 1292(b) is committed to the discretion of

the courts of appeals. *See, e.g.*, *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 n.9 (1994); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

As this Court recently reiterated, "decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) (internal quotation marks and citation omitted). Whether a court of appeals abused its discretion in declining to permit an appeal is a fundamentally different decision from whether a district court erred as a matter of law in concluding that it lacked jurisdiction and remanding a case.

To be sure, application of an abuse of discretion standard may, in some cases, involve consideration of issues of law. *See id.* at 1749. In particular, a court would "necessarily abuse its discretion [by] bas[ing] its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Thus, if a court of appeals states that its decision to deny permission to appeal is based on the resolution of a legal issue, this Court may decide that legal issue in determining the propriety of the court of appeals' denial of leave to appeal. For example, in *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972), this Court reviewed (and affirmed on the merits) a court of appeals' ruling that a discretionary appeal under § 1292(b) was barred in a government civil antitrust case by another statute, the Expediting Act of 1903. *Id.* at 410–11.

Likewise, if a court of appeals were to deny permission to appeal on the stated ground that the decision of the district court was *correct on the merits*, that issue also would be properly within the scope of

this Court's certiorari jurisdiction over the case decided by the court of appeals. For example, in *Pearson Education, Inc. v. Liu*, the Second Circuit denied leave for an interlocutory appeal under § 1292(b) because, as its order denying review stated, its prior opinion in *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210 (2011), had resolved the issue by "holding that the first sale doctrine, codified at 17 U.S.C. § 109(a), does not apply to copies of copyrighted works produced outside of the United States." *Pearson Educ., Inc. v. Liu*, No. 10-894, Order (2d Cir. Nov. 18, 2011). When this Court reversed the Second Circuit on this point of law in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), it deprived the order denying review in *Liu* of its stated legal basis. Thus, it was an appropriate exercise of this Court's certiorari jurisdiction to grant certiorari, vacate the denial of review, and remand. *Liu v. Pearson Educ., Inc.*, 133 S. Ct. 1630 (2013).

Here, by contrast, there is nothing to indicate that the court of appeals based its decision to deny permission to appeal on a determination that the district court's decision was correct or on any particular view of the law. And outside of the unusual circumstances where a court of appeals expressly decides the merits of an appeal while ostensibly denying permission to appeal, the propriety of denying review does not turn on the correctness of the underlying order. If an appeals court's denial of leave to appeal were subject to reversal merely because the district court erred in issuing the underlying order, an appellate court could *never* properly deny a § 1453(c) appeal without first deciding the merits adversely to the party seeking leave to appeal. If a court of appeals must decide the merits to deny leave to appeal, the appeal is no longer

permissive, but effectively an appeal as a matter of right. Such a result would transform the permissive "may accept" in § 1453(c) into a directive that appellate courts "shall accept" an appeal from a district court's remand order.

IV. There Is No Proper Basis for Holding That the Tenth Circuit Abused Its Discretion in Denying Permission to Appeal.

When the issue posed by this case is properly framed—whether the court of appeals abused its discretion in denying the appeal—it becomes apparent that Dart Cherokee has shown no proper basis for overturning the court of appeals' exercise of discretion. Dart Cherokee has not even attempted to show that the denial of permission to appeal was improper, and there are no evident bases for finding that the court of appeals abused its discretion.

Except when a discretionary decision is premised on an erroneous view of the law or on clearly erroneous factual findings—neither of which is the case here—establishing that a court abused its discretion generally requires a showing that it considered impermissible factors, failed to consider factors that it was required to consider, or balanced the relevant factors unreasonably or arbitrarily. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). Dart Cherokee has made no such showing.

Although the court of appeals did not state reasons for its decision, appellate courts are generally not required to give reasons for discretionary denials of appellate review. *See Kraus v. Bd. of County Rd. Comm'rs*, 364 F.2d 919 (6th Cir. 1966) ("[I]t is not incumbent upon this court to express our reasons for granting or denying an application for permission to

take an interlocutory appeal"). Under § 1292(b), courts occasionally explain their actions granting or denying permission to appeal, "but ordinarily action is taken by simple order." Charles Wright *et al.*, 16 *Federal Practice & Procedure* § 3929 (4th ed. 2014). The permissive appeal model embodied in § 1292(b), and later borrowed in § 1453(c), was originally based on this Court's discretionary certiorari jurisdiction, which requires no statement of reasons for the denial of review; thus, the Senate Report on the legislation including § 1292(b) expressly contemplated that "permission might be denied without specifying reasons." *Id.* (citing S. Rep. No. 85-2434, 1958 U.S. Code Cong. & Admin. News 5255, 5257).

Absent any obligation by the court to explain itself, consideration of both the breadth of discretion granted by § 1453(c) and the factors that the Tenth Circuit and other courts of appeals have identified as relevant to the exercise of that discretion strongly weighs against a finding of abuse of discretion here. First, although this Court has never considered the scope of discretion under § 1453(c), it has pointed out that § 1292(b), which similarly provides broadly that a court of appeals "may" permit an interlocutory appeal (and which similarly is an exception to a general principle prohibiting such an appeal), grants the courts of appeals exceptionally broad discretion. The Court has stated that an "appellate court may deny the appeal [under § 1292(b)] for any reason, including docket congestion." *Coopers & Lybrand*, 437 U.S. at 475. In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. at 883 n.9, the court reiterated that, under § 1292(b), "the discretion to decline to hear an appeal is broad." Although this Court engaged in review of legal issues embedded in orders denying leave

to appeal under § 1292(b) in *Tidewater* and *Liu*, this Court has never to our knowledge held that the denial of an appeal under § 1292(b) was an abuse of discretion. The similar language of § 1453(c) suggests similarly broad discretion, making demonstration of an abuse of discretion similarly difficult.

Second, the Tenth Circuit, like the other courts of appeals, has held that an important consideration in determining whether to permit an appeal under § 1453(c) is "the presence of an important CAFA-related question." *See BP Am., Inc. v. Okla. ex rel. Edmondson*, 613 F.3d 1029, 1034 (10th Cir. 2010) (quoting *Coll. of Dental Surgeons of Puerto Rico v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009)) (internal quotation marks omitted). "A common theme" running through the decisions of several circuits is that such a question generally counsels in favor of accepting an appeal under § 1453(c), while "[t]he presence of a non-CAFA issue (even an important one) is generally not thought to be entitled to the same weight." *Coll. of Dental Surgeons*, 585 F.3d at 38; *see also, e.g.*, *Louisiana v. Am. Nat. Prop. Cas. Co.*, 746 F.3d 633, 636 (5th Cir. 2014); *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010); *see also* S. Rep. No. 109-14, at 49 ("The purpose of [§ 1453(c)] is to develop a body of appellate law interpreting [CAFA].")

The issue here, although it arose in an action removed under CAFA, concerns not CAFA but a generally applicable procedural question: when allegations or evidence of the amount in controversy must be presented to establish federal removal jurisdiction. Thus, Dart Cherokee's statement of the question presented makes no mention of CAFA. *See* Pet. Br. i ("Must a

defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is including the required 'short and plain statement of the grounds for removal' enough?"). Because the same issue could arise in a case removed on the basis of conventional diversity jurisdiction, or any other jurisdictional basis—in which case a district court's holding that a removal petition must contain allegations or evidence demonstrating jurisdiction would be unreviewable—the court of appeals could rationally have concluded that the happenstance that the issue arose in a CAFA case was not sufficient to justify invocation of an appeal mechanism designed for resolving important CAFA-related issues. In short, the Tenth Circuit could properly have declined the application based on consideration of a factor used by many circuits in deciding whether to accept a § 1453(c) appeal.

The Tenth Circuit judges who denied leave to appeal may also have construed the district court's order differently than does Dart Cherokee. They may have concluded that, fairly read, the order turned on whether Dart Cherokee's removal notice contained adequate, non-conclusory *allegations* of facts supporting the amount in controversy, rather than on whether the notice was accompanied by *evidence*. *See supra* page 4. So viewed, the case would present only a fact-bound issue of application of the well-settled principle that a removal notice must sufficiently allege a factual basis for its amount-in-controversy allegations.[7] A

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[7] *See, e.g.*, *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (stating that when a plaintiff's complaint does not allege the amount in controversy, a defendant removing under CAFA must satisfy the "pleading requirement" of "explain[ing] plausi-

(*Footnote continued*)

reasonable judge could conclude that such a question, of little interest to anyone other than the parties, did not merit an interlocutory appeal.

Upholding a decision challenged as an abuse of discretion does not require the reviewing court to agree with the decision or to conclude that, in the same circumstances, it would have made the same decision. *See, e.g.*, *Piper*, 454 U.S. at 257; *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). Instead, the question is whether the party challenging the decision has demonstrated that a rational decisionmaker considering appropriate factors could not have reached that decision. In view of the scope of the court of appeals' discretion and the factors that are at least potentially appropriate considerations guiding its exercise, no abuse of discretion is evident here.

V. This Court Should Either Affirm the Tenth Circuit's Denial of Permission to Appeal or Dismiss the Writ as Improvidently Granted.

In light of Dart Cherokee's failure to carry its burden of demonstrating that the court of appeals abused its discretion in denying permission to appeal the remand order in this case, it would be appropriate simp-

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bly how the stakes exceed $5 million"); *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994) (stating that a removal notice must "allege facts adequate to establish that the amount in controversy exceeds the jurisdictional amount"); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (proponent of federal jurisdiction "must allege in his pleading the facts essential to show jurisdiction"); Wright *et al.*, 14AA *Federal Practice & Procedure* § 3702.2 ("Conclusory assertions [in a removal notice] will not be sufficient.").

ly to affirm the court of appeals' order denying leave to appeal. Should the Court do so, it should also make clear that it is not ruling on the correctness of the underlying remand order, which is not a matter properly before the Court.

Alternatively, the Court may dismiss the writ as improvidently granted. That disposition would be proper for a number of reasons. First, the Court granted certiorari to consider the question presented, and an unanticipated obstacle to reaching the question that the Court thought merited review is a common reason for such a dismissal. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 656–63 (2003) (Stevens, J., concurring). Second, the issue whether the court of appeals abused its discretion in issuing an order denying permission to appeal is not itself one that would appear independently to merit this Court's consideration, yet, for the reasons set forth above, that issue is the sole question presented by the court of appeals' action, and considering it is at the very least a necessary antecedent to reaching the question presented by Dart Cherokee.

Third, absent adequate briefing on an issue, this Court generally refrains from deciding it. *See, e.g., Slack v. McDaniel*, 529 U.S. at 485. A complete inquiry into whether the court of appeals abused its discretion in denying review would entail briefing by the parties on that issue, which should involve attention to the nature of the court's discretion, the considerations relevant to its exercise, the role (if any) that an assessment of the correctness of the underlying remand order should play in the court of appeals' decision to entertain an appeal, whether the courts have an obligation to explain a decision denying review,

and, if not, whether and how an abuse of discretion may be shown. Because the only issue properly before the Court in this case is the one that the parties have not briefed, the only alternatives to deciding it based on inadequate briefing are dismissing the writ or ordering rebriefing and reargument, and the latter course does not seem justified here.

If, notwithstanding these considerations, the Court should determine either that it is unnecessary to consider the propriety of the denial of leave to appeal before addressing the merits, or that the court of appeals acted improperly in denying review, it should explain those conclusions so that litigants may understand what issues are properly placed before this Court when a court of appeals has denied leave to appeal, and/or what considerations may render a court of appeals' decision to deny leave to appeal improper. In particular, if the Court were to conclude that an appellate decision to deny permission to appeal under § 1453(c) is subject to reversal whenever the underlying remand decision is erroneous, it should clearly say so, so that courts of appeals would understand that although the statute appears to give them discretion whether or not to entertain an appeal, they are actually obliged to decide the merits of the remand decision in every case.

Assuming, as we do, that the Court would stop short of adopting that position, if the Court were nonetheless to determine that the court of appeals abused its discretion by denying permission to appeal in the particular circumstances of this case, the best course would be to remand the case to allow the court of appeals to decide the merits of the appeal in the first instance. As the dissenters from the denial of re-

hearing pointed out, the Tenth Circuit has not clearly decided that a remand petition must be accompanied by evidence demonstrating the existence of jurisdiction. *Compare, e.g.*, *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008) ("[B]eyond the complaint itself, other documentation can provide the basis for determining the amount in controversy—either interrogatories obtained in state court before removal was filed, or affidavits or *other evidence submitted in federal court afterward*." (emphasis added)), *with Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (refusing to consider facts set forth in jurisdictional brief that were not included in the notice of removal). Moreover, if the Tenth Circuit were to consider the appeal, it might well construe the remand order as turning on the adequacy of Dart Cherokee's allegations, rather than on a rule precluding consideration of evidence outside the removal notice. Its resolution of the appeal, then, would be based on those allegations, not on the "rule" that the parties here debate.

Thus, how the court of appeals would resolve this case if it decided the appeal on the merits is unknown, and a merits decision by that court might obviate any perceived need for further review of the question posed by Dart Cherokee. Even if it did not, this Court, if it considered the case after review by the Tenth Circuit on the merits, would have the benefit of the fully articulated view of an appellate court to guide its consideration.

Again, however, the proper course is for this Court neither to reach the merits nor to remand them, but to affirm or to dismiss the writ. In advocating these alternatives, we recognize that it may seem unpalatable to allow a district court remand order based on a

possibly erroneous legal theory to stand unreviewed on appeal. Unreviewed error is obviously a potential consequence of a regime in which jurisdictional remand orders are completely unreviewable, as is true under § 1447(d) in most cases. *See Kircher*, 547 U.S. at 645 (holding a district court's remand order unreviewable under § 1447(d) although it was based on a legal theory that this Court had expressly held to be incorrect in a recent decision). The risk of unreviewed error is also inherent in the variation of the appealability regime created by § 1453(c), in which the courts of appeals stand as gatekeepers exercising discretion over whether to permit appeals. Taking that risk is the choice Congress made in providing for discretionary appeals rather than appeals as a matter of right.

Moreover, other cases may present opportunities for appellate consideration of the legal theory underlying the district court's action in the Tenth Circuit or this Court. The ambiguity of the Tenth Circuit's own law on the point makes it likely that the issue will again arise in that circuit, and the court might well make a different decision about whether to allow an appeal if the issue came before a different panel, or if an order denying leave to appeal were considered en banc by the full complement of the court's active judges. Even if the issue never makes its way back to the Tenth Circuit, it also could potentially be addressed by this Court, if there were sufficient reason to do so, in a case arising from another circuit that did not require evidence to be presented along with a removal notice.

Regardless of the likelihood of these possibilities, however, the merits of the district court's remand decision are not presented by this case, in which the sole

issue is whether the court of appeals properly denied permission to appeal, and in which there is no basis for holding that it did not.

CONCLUSION

The Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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July 2014

AMICUS CURIAE BRIEF

No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, and CHEROKEE BASIN PIPELINE, LLC,
Petitioners,

v.

BRANDON W. OWENS, on behalf of himself and all others similarly situated,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND FEDERATION OF DEFENSE & CORPORATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The federal district court remanded this case to state court because the removal petition, although alleging that the amount in controversy exceeded $5,000,000, did not include evidence to support that allegation. The Tenth Circuit refused to review the district court's order. The question presented is:

Must a defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is it enough to include the "short and plain statement of the grounds for removal" required by 28 U.S.C. § 1446(a)?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF's primary mission is the defense and promotion of free enterprise, and ensuring that economic development is not impeded by excessive litigation.

WLF has regularly appeared in this and other federal courts to support the rights of defendants in a state court action to remove the case to federal court. *See, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005).

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs.

The Federation of Defense & Corporate Counsel (FDCC) was formed in 1936 and has an international

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

membership of 1,400 defense and corporate counsel. FDCC members work in private practice, as general counsel, and as insurance claims executives. Membership is limited to attorneys and insurance professionals nominated by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. Its members have established a strong legacy of representing the interests of civil defendants.

The Tenth Circuit has condoned a narrow interpretation of the federal removal statutes that, in many instances, will create significant difficulties for defendants seeking to exercise their rights to remove cases from state to federal court. The decision below reflects a misguided view, pervasive among many lower federal courts, that federal removal jurisdiction is disfavored and that all doubts regarding jurisdiction should be strictly construed against the defendant. *Amici* believe that view is based on a misunderstanding of the history of removal jurisdiction and the important role that the Founders foresaw that removal jurisdiction would play in ensuring an impartial forum for out-of-state defendants.

Amici are concerned that unless the Court uses this case not only to overturn the decision below but also to explain that the lower courts' recognition of a presumption against removal is unfounded, many federal courts will continue to adhere to such a presumption. *Amici* have no direct interests, financial or otherwise, in the outcome of this case. They are

filing due solely to their interests in the important removal jurisdiction issues raised by this case.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioners. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

The case raises important questions regarding procedures for removing suits to federal court pursuant to the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4, a statute adopted by Congress in 2005 to broaden federal court diversity jurisdiction and to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). Congress found that class action lawsuits raising issues of "national importance" were being improperly "[kept] out of Federal court," and that state courts were "sometimes acting in ways that demonstrate bias against out-of-State defendants" and otherwise "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." *Id.*, § 2(a)(4).

The case addresses whether Petitioners took sufficient steps to remove a lawsuit to federal court pursuant to CAFA and 28 U.S.C. § 1446(a), which provides that removal petitions must "contain[ ] a short and plain statement of the grounds for removal."

Respondent Brandon Owens contends that

Petitioners (collectively, "Dart Cherokee") breached a contract by underpaying royalties allegedly owed him from production of oil wells located in Kansas. He filed suit against Dart Cherokee in Kansas state court on behalf of himself and similarly situated royalty owners. In December 2012, Dart Cherokee removed the case to U.S. District Court for the District of Kansas, asserting jurisdiction pursuant to CAFA. Pet. App. 37a-42a. The notice of removal stated that Dart Cherokee had calculated the total additional royalties that would be owed if "all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made" and that it had determined, based on that calculation, that "the amount of additional royalty sought is in excess of $8.2 million." *Id.* at 40a.

Owens filed a motion for remand, asserting that the removal petition inadequately demonstrated that the amount in controversy exceeded $5,000,000.[2] The district court agreed and remanded the case to state court in May 2013. Pet. App. 15a-28a. The court ordered a remand despite acknowledging that Dart Cherokee's response to the motion for remand adequately demonstrated that the amount in controversy exceeded $5,000,000 and that Owens himself asserted that the amount in controversy was at least $21.5 million. *Id.* at 20a-21a. The court concluded that under Tenth Circuit case law, evidence supporting federal jurisdiction must be included within the removal

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[2] CAFA grants federal district courts original jurisdiction over certain class actions; among the jurisdictional requirements is that the class action be one in which the amount in controversy exceeds $5,000,000, exclusive of interests and costs. 28 U.S.C. § 1332(d)(2).

petition itself and not added later. *Id.* at 27a. Applying that standard, the court determined that the removal petition was deficient because it "fail[ed] to incorporate any evidence" supporting its amount-in-controversy calculation, "such as an economic analysis of the amount in controversy or settlement estimates." *Id.* at 25a-26a.

The court explained that its decision to remand was "[g]uided by the strong presumption against removal." *Id.* at 28a. It said that the Tenth Circuit "narrowly construes removal statutes, and all doubts must be resolved in favor of remand." *Id.* at 17a-18a.

In June 2013, a divided Tenth Circuit panel summarily denied Dart Cherokee's petition for permission to appeal. Pet. App. 13a-14a. By an equally divided vote, the appeals court denied Dart Cherokee's petition for rehearing *en banc*. *Id.* at 1a-12a. Judge Hartz, joined by Judges Kelly, Tymkovich, and Phillips, filed an opinion dissenting from denial of the petition. *Id.* at 2a-12a. He asserted that 28 U.S.C. § 1446(a) does not require a defendant to include evidence in its removal petition: "a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation." *Id.* at 11a.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the decisions below were based on an implausible interpretation of the "short and plain statement" requirement of 28 U.S.C. § 1446(a). By alleging in their notice of removal

that "the amount of additional royalty sought [in the complaint] is in excess of $8.2 million," and by including a four-paragraph explanation of the steps they undertook to calculate that amount, Petitioners fulfilled their § 1446 obligation to provide a "short and plain statement" of their basis for alleging that the $5,000,000 jurisdictional amount was satisfied.

Amici write separately to focus on a factor that appears to have led the lower courts astray: their reliance on an alleged presumption against removability. The district court explicitly stated that its decision to remand was "[g]uided by the strong presumption against removal." Pet. App. 28a. The district court and the Tenth Circuit are not alone in adhering to that presumption: *every* regional federal appeals court other than the Seventh Circuit has adopted a presumption against removability and resolves all doubts in favor of remand.

There is no foundation for such a presumption in this Court's case law. *Amici* respectfully submit that adherence to the presumption is undermining the intent of Congress, which on numerous occasions has adopted statutes intended to facilitate removal of cases from state to federal court by out-of-state defendants. CAFA is the best example of such a statute; Congress adopted it for the purpose of ensuring a federal forum for all large class actions involving parties of diverse citizenship. The courts below cited no statutory language in support of their conclusion that removal statutes should be strictly construed, and there is none.

Nor does a presumption against removability

derive any support from the structure of the Constitution. Some lower federal courts have justified the presumption as a means by which they can avoid encroaching on the jurisdiction of state courts. But the Framers saw things differently; they contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government. Diversity jurisdiction provided out-of-state plaintiffs with a means of avoiding the prejudice in favor of local litigants foreseen by the Framers. Removal jurisdiction provided the self-same protection to out-of-state defendants. As the Court recognized in one of its earliest landmark cases, the Constitution was designed for the benefit of *all* citizens—not only plaintiffs who "would elect the national forum" but also defendants who sought to "try their rights, or assert their privileges before the same forum." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816).

If the Court's opinion in this case focuses solely on the meaning of § 1446(a), it can correct the Tenth Circuit's singular misinterpretation of the statute. That mistake is sufficient by itself to have a seriously adverse effect on the removal rights of many litigants. But the presumption on which the Tenth Circuit based its erroneous statutory interpretation—a presumption that disfavors removal rights to such an extent that *all* doubts regarding removability are to be resolved in favor of remand—is of far greater concern. The presumption has been adopted by 10 of 11 regional federal appeals courts and has a significant and continuing impact on the ability of defendants to exercise the removal rights granted them by Congress. Accordingly, *amici* urge the Court to include in its

opinion an unequivocal rejection of the presumption against removability and to explain that nothing in the federal removal statutes, the Constitution, or the Court's case law provides support for the presumption.

Once the presumption against removability is eliminated from consideration, the implausibility of the district court's construction of 28 U.S.C. § 1446(a) is readily apparent. By requiring that a notice of removal need only contain a "short and plain statement of the grounds of removal," Congress made clear its intent that the adequacy of a notice of removal should be subject to the same straightforward pleading standards imposed by Rule 8 of the Federal Rules of Civil Procedure on complaints initially filed in federal court. If a district court or a plaintiff later calls into question whether the defendant can demonstrate compliance with jurisdictional requirements imposed by the removal statutes, then the defendant will, of course, be required to present evidence to demonstrate the existence of jurisdiction. But nothing in the federal removal statutes suggests that a defendant forfeits its right to federal court jurisdiction if it fails to present such evidence at the same time that it submits its notice of removal.

Indeed, CAFA provides unequivocally that the notice of removal adequately alleges satisfaction of the amount-in-controversy requirement if the complaint filed by the plaintiff class alleges that the amount in controversy exceeds $5,000,000, without regard to whether the plaintiffs have affixed to the complaint evidence supporting their allegation. 28 U.S.C. § 1446(c)(2) (stating, subject to certain exceptions, that

"the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy"). Nothing in CAFA's statutory language suggests that Congress intended to accept amount-in-controversy allegations from plaintiffs even when not supported by evidence, yet not to accept similar allegations in a defendant's notice of removal.

ARGUMENT

I. The Tenth Circuit's Presumption Against Removability Is an Invention of the Lower Federal Courts That Has No Foundation in This Court's Decisions and Is Contrary to Normal Principles of Statutory Construction

Underlying the district court's decision to grant the remand motion was its understanding that removal statutes should be construed strictly against defendants seeking to exercise their removal rights; it stated that the decision was "[g]uided by the strong presumption against removal." Pet. App. 28a. It concluded that federal courts must "narrowly construe[] removal statutes, and all doubts must be resolved in favor of remand." *Id.* at 17a-18a. That conclusion was in accord with well-established Tenth Circuit case law. *See, e.g., Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1095, 1097 (10th Cir. 2005) ("removal statutes are to be strictly construed, with all doubts resolved against removal"); *Martin v. Franklin Cap. Corp.*, 251 F.3d 1284, 1289 (10th Cir. 2001) ("the courts must rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states").

The supposed presumption against removability has no foundation in this Court's decisions and is contrary to normal rules of statutory construction. That presumption influenced the district court to conclude erroneously that the case should be remanded to state court.

Unfortunately, the Tenth Circuit is not alone among the federal appeals courts in erroneously adopting a generalized presumption against removability. Some form of the presumption has been adopted by every one of the regional federal appeals courts other than the Seventh Circuit.[3] In light of the widespread misperception among the lower federal courts regarding the existence of such a presumption, *amici* urge the Court to provide guidance to the lower federal courts by stating explicitly that removability is to be determined solely on the basis of the governing statutory language and not on the basis of any

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[3] *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 76-77 (1st Cir. 2009); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 220 (2d Cir. 2013); *Brown v. JEVIC*, 575 F.3d 322, 326 (3d Cir. 2009); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 212 (5th Cir. 2013); *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 554-55 (6th Cir. 2005); *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 975 (8th Cir. 2011); *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1107 (9th Cir. 2010); *Scimone v. Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013). *But see Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular"); *Johnson v. Pushpin Holdings, LLC*, __ F.3d __, 2014 U.S. App. LEXIS 6554, at *10 (7th Cir. 2014) (stating that there is no presumption in favor of remand in CAFA cases).

presumptions for or against removability.[4]

A. Permitting Removal of Diversity Cases Is a Key Component of Federalism and Does Not Show a Lack of Respect for State Courts

In many instances, federal appeals courts have adopted a strong presumption against removal based on a conviction that removal of a case from state to federal court "implicate[s] federalism concerns" and "encroaches on a state court's jurisdiction." *See, e.g., First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462 (6th Cir. 2002). But that conviction derives no support from the historical understanding of removal rights; to the contrary, the Framers contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 486 (2d ed. 1836). Similarly,

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[4] Such guidance is particularly appropriate in light of the statutory bar on appeals from most remand orders, a bar that renders erroneous remand orders largely uncorrectable. *See* 28 U.S.C. § 1447(d).

Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included cases "between Citizens of different States" within the "judicial Power." U.S. Const., art. III, § 2, cl. 1.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised

> exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) at 348.

In sum, granting out-of-state defendants broad rights to remove cases to federal court is fully consistent with the federal system of government established by the Framers. It is no more an affront to state courts to permit out-of-state defendants to remove cases to federal court than it is to permit out-of-state plaintiffs to invoke diversity jurisdiction in order to file federal court lawsuits that raise state-law claims.

Indeed, there is little reason to suppose that state court judges are offended when newly filed lawsuits are removed from their courtrooms and transferred to federal court. As one scholar has observed:

> [T]he comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far greater concern of state courts may well be that the federal courts will relieve the congestion on their own dockets at the expense of state courts.

Scott R. Haiber, *Removing the Bias Against Removal,*

53 CATH. U. L. REV. 609, 660 (2004).

B. A Presumption Against Removal Cannot Be Inferred from the Federal Removal Statutes, and This Court Has Not Endorsed Such an Inference

During the past 225 years, Congress has frequently amended the removal statutes, sometimes expanding the scope of removal jurisdiction, sometimes cutting back on its scope. The Court's decisions interpreting those statutes have employed traditional rules of statutory interpretation in an effort to effectuate Congress's intent. The decisions have never adopted a presumption against removability or otherwise suggested that the removal statutes ought not to be construed based on the most natural reading of the statutory language.

The federal government's distrust of state courts' ability to deal fairly with out-of-state litigants in the period following the Civil War led Congress to expand federal court jurisdiction. In an effort to protect federal officers and freed former slaves, Congress adopted a series of laws that extended both the original and removal jurisdiction of the federal judiciary. This legislative initiative culminated in the Removal Act of 1875,[5] a law that not only vested federal courts with federal-question jurisdiction for the first time since the

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[5] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

short-lived Judiciary Act of 1801,[6] but also significantly expanded removal jurisdiction. Among other provisions, the 1875 law provided for removal of state-court cases raising federal questions, permitted removal by plaintiffs, permitted removal of an entire lawsuit if it contained *any* controversy between citizens of different states, and provided for appellate review of remand orders.

The experiment with greatly expanded removal jurisdiction lasted only 12 years. The Judiciary Act of 1887 largely eliminated the expansions adopted in 1875. *See* Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. In particular, the 1887 statute eliminated the right of removal by plaintiffs and in-state defendants. Importantly, however, the 1887 statute was not viewed as an abandonment of the Framers' commitment to diversity jurisdiction and removal jurisdiction. To the contrary, the 1887 statute largely restored the law regarding removal of diversity jurisdiction cases to the provisions contained in the Judiciary Act of 1789. As the Court recognized in *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653 (1923), the right of removal had not been abridged beyond restrictions explicitly included in the 1887 statute:

> [W]hile the comparison between [the 1875 statute and the 1887 statute, as amended in

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[6] The fact that the federal courts did not acquire general federal-question jurisdiction until 1875 puts to rest the notion that the federal courts were created primarily for the purpose of addressing federal issues, with state-law issues more appropriately reserved for the state courts. Before 1875, the overwhelming majority of cases in the federal courts addressed state-law issues.

> 1888] shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be effected. Certainly there is nothing in this which suggests that the plain terms of the act of 1888—by which it declared that any suit "between citizens of different states" brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State"—should be taken otherwise than *according to their natural and ordinary signification*.

Id. at 660-61 (emphasis added).

Those who support the notion that removal statutes ought to be strictly construed often point to a 1941 Supreme Court decision, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). But *Shamrock* needs to be understood in the historical context discussed above—the 1875 expansion of removal jurisdiction and its subsequent retrenchment in 1887 and thereafter. Certainly, nothing in *Shamrock* indicates that federal courts should apply any

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[7] *Shamrock* rejected the claims of a state-court plaintiff that it qualified as a "defendant," entitled to remove the case to federal court, after it was served with a counterclaim. While recognizing that such removal was authorized under the 1875 removal statute, the Court noted that the authorization was eliminated by Congress in 1887, and that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." 313 U.S. at 108-09. In other words, any "strict construction" was not constitutionally based but rather was based on "the policy of the successive acts of Congress" in the years following 1887.

constitutionally based presumptions either for or against the right of removal. Rather, jurisdiction under a removal statute is to be interpreted according "to the precise limits which the statute has defined." *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 279 (1934)).

The congressional policy of strictly limiting removal rights is no longer in place; in the absence of such a congressional policy, the Tenth Circuit's presumption against removability cannot be justified. The most recent evidence that Congress does not mandate a presumption against removability is its adoption of CAFA in 2005. CAFA justified its expansion of removal jurisdiction in part by explicit findings that State courts are "sometimes acting in ways that demonstrate bias against out-of-State defendants" and that litigation abuses in State courts "undermine the concept of diversity jurisdiction as intended by the framers of the United States Constitution." CAFA § 2(a)(4), 28 U.S.C. § 1711 note. In other words, CAFA was adopted for the purpose of protecting the precise category of defendants at issue in this case: out-of-state defendants against whom large damage claims have been asserted and who fear that they may be discriminated against in state court. As one Fourth Circuit judge recently observed:

> CAFA unquestionably expanded federal jurisdiction and liberalized removal authority, thus reversing the restrictive federal jurisdiction policies of Congress that both *Healy* and *Shamrock Oil* listed as the primary justification for application of the canon [of strict interpretation of removal statutes]. [T]his

> stated purpose for expanding federal jurisdiction and liberalizing removal in the CAFA context is part of the statutory text, and federal courts surely have an obligation to heed it.

Palisades Collections LLC v. Shorts, 552 F.3d 327, 342 (4th Cir. 2008) (Niemeyer, J., dissenting).[8]

In the 73 years since *Shamrock Oil* was decided, the Court has not endorsed any presumption against removal. Recent Supreme Court decisions have decided removability questions solely by reference to the relevant statutory language, without applying any presumptions. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). *Breuer* turned on the meaning of a potentially ambiguous clause in 28 U.S.C. § 1441(a), which permits the removal to federal courts of state-court civil actions over which the federal courts would have had original jurisdiction. The Court explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret the ambiguous clause as precluding removal. After noting

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[8] Congress has expanded the scope of removal jurisdiction on numerous other occasions since 1941. For example, in 1965 Congress expanded the time period for filing a removal petition from 20 to 30 days following receipt of the complaint. *See* Act of September 29, 1965, 79 Stat. 887; *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 352 n.3 (1999). As Petitioners note, Pet. Br. at 11, Congress amended 28 U.S.C. § 1446 in 1988 to simplify the removal process by eliminating the requirement that a "verified petition" be included in the removal papers. Instead, defendants need now only include "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642.

Shamrock Oil's "strict construction" language, the Court said, "But whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Id.* at 697.

In sum, the presumption against removability adopted by the courts below has no foundation in this Court's decisions and is contrary to normal rules of statutory construction. The district court's reliance on a strong presumption undoubtedly contributed to its erroneous interpretation of 28 U.S.C. § 1446(a). Unfortunately, although the interpretation of the statute by the courts below is implausible, one can expect equally implausible interpretations of the federal removal statutes to continue to emanate from the lower federal courts so long as the strong presumption against removability continues to be accepted by 10 of the 11 regional circuits. Accordingly, *amici* urge the Court to include in its opinion language that strongly disavows the existence of a presumption against removability, not only in connection with CAFA cases but with respect to all other cases involving statutes authorizing removal.

II. The "Short and Plain Statement" Requirement Contemplates a Pleading Standard, Not an Evidentiary Standard, at the Notice of Removal Stage

Removal of a class action to federal court under CAFA is made "in accordance with 28 U.S.C. § 1446." 28 U.S.C. § 1453. Section 1446(a) requires a "short and plain statement of the grounds of removal" in the notice of removal. The "short and plain statement"

requirement has been in the removal statute for over 25 years; the removal statute was amended in 1988 to mirror the pleading standards in Federal Rule of Civil Procedure 8 and to make the pleading of removal simpler. See H.R. Rep. 100-889, 71, 1988 U.S.C.C.A.N. 5982, 6032. The change was also fueled by concern that the "petition" requirement had "led some courts to require detailed pleading," and the change was intended to permit more liberal pleading. *Id*; *see also Standridge v. Wal-Mart Stores, Inc.*, 945 F. Supp. 252, 254 (N.D. Ga. 1996).

Congress substituted "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds of removal" for "a verified petition containing a short and plain statement of the facts which entitle him or them to removal." 1988 Amendments Subsec. (a), Pub. L. 100-702, § 1016(b)(1). The incorporation of Rule 11 standards and potential sanctions, like the verification and removal bond requirements before it, served "to assure the integrity of the grounds asserted as a basis for removal and indemnify the plaintiff for costs incurred in remanding an improperly removed action." John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Act of 1988 and 1990*, 24 U.C. Davis L.Rev. 735, 752 (Spring 1991).

Where a complaint specifies that the plaintiff is seeking damages in an amount exceeding the jurisdictional minimum, "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy." 28 U.S.C. § 1446 (c)(2). In

such cases, defendants may satisfy the "short and plain statement" requirement by citing the relevant paragraphs of the complaint and attaching a copy of it. *Rescuecom Corp. v. Chumley*, 522 F. Supp. 2d 429, 434 (N.D.N.Y. 2007). But some jurisdictions do not require a plaintiff to allege the full amount of damages sought. *See, e.g. Murchison v. Progressive N. Ins. Co.*, 564 F Supp. 2d 1311, 1315 (E.D. Okla. 2008). And others prohibit a demand for a specific sum in the complaint or allow for recovery beyond any demand in the pleadings. *See, e.g. Spence v. Centerplate*, 931 F. Supp. 2d 779, 781 (W.D. Ky. 2013); La. Code Civ. P. art. 893 (West 2014). In such cases, or where the plaintiff for some other reason fails to assert a damage amount in the complaint, "§ 1446 permits a defendant to assert the amount in controversy in its notice of removal." *Spence*, 931 F. Supp. 2d at 781 (citing 28 U.S.C. § 1446(c)(2)(A)(ii)).

Just as when the notice of removal is founded on allegations in the complaint, there should be no requirement that the defendant produce evidentiary support for allegations founded on information outside of the complaint at the notice of removal stage either. Until there is disagreement as to whether the amount in controversy satisfies the removal threshold, additional evidence should not be required to support the notice of removal. The district court's ruling to the contrary should be reversed.

Both the complaint and the notice of removal are governed by Rule 11, pursuant to which sanctions for frivolous assertions can be granted. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391-92 (1990). Moreover, if the plaintiff disagrees with the asserted

amount in controversy, it can move to remand. 28 U.S.C. § 1447(d); *see also* 29A Fed. Proc., L. Ed. § 69:71 ("A plaintiff . . . should promptly examine the propriety of a removal upon the receipt of the notice of removal. Should a defect be discovered, the plaintiff should immediately move to remand to the state court."). At the motion to remand stage, the defendant's burden of proving the sufficiency of the amount in controversy can then be tested. *See, e.g. Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006); *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 472-73 (3d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

Placing a heavier burden on a defendant seeking removal also would obstruct the express purpose of CAFA, which was to greatly expand the federal courts' jurisdiction over large, nationally important class actions. *See* Judiciary Committee Report on Class Action Fairness Act, S. Rep. 109-14 at 43 (2005); *Standard Fire Ins. Co.*, 133 S. Ct. at 1350. In adopting CAFA, Congress expressed grave concerns about the proliferation of state-court class actions that employed procedures unfair to non-resident defendants. Pub. L. No. 109-2, § 2(a)(4). Congress also found that "[a]buses in class actions undermine[d] the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution. " *Id.*

CAFA's provisions are to be read broadly, with "a

strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." S. Rep. No. 109-14 at 43; *see id.* at 42 ("If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."); 151 Cong. Rec. H723-01, at H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("If a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case").

Congress "did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trustees of Maryland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992) (superseded by statute on other grounds, as stated in *Moehring v. Mortgage Elec. Registration Sys., Inc.*, 3:13-CV-00567-MOC, 2014 WL 1091071 (W.D.N.C. Mar. 17, 2014)). In 2013, this Court held that a class-action plaintiff could not avoid removal by stipulating to a damages amount below the jurisdictional minimum prior to class certification. *Standard Fire Ins. Co.*, 133 S. Ct. at 1347. Similarly, requiring evidence in addition to a "short and plain statement" would eviscerate CAFA's purpose and give plaintiffs "a bag of tricks" with which to avoid federal jurisdiction that Congress granted to defendants.

CONCLUSION

Amici curiae request that the Court reverse the decision of the district court. In particular, *amici* urge the Court to strongly disavow the existence of a presumption against removability, in connection not only with CAFA cases but also with respect to all other cases involving statutes authorizing removal.

Respectfully submitted,

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Dated: May 29, 2014